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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

LILLIAN I. RANDALL,
Petitioner,
vs.
LABADDIE BOTTOMS RIVER PROTECTION DISTRICT OF FRANKLIN COUNTY, MISSOURI, a Corporation,
Respondent.

No. 981

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Missouri

and

BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

LILLIAN I. RANDALL,
Petitioner,

vs.

LABADDIE BOTTOMS RIVER PROTECTION DISTRICT OF FRANKLIN COUNTY, MISSOURI, a Corporation,
Respondent.

No. .....

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of Missouri.

(The brief in support of this petition begins at page 43. The Statutes of the State of Missouri involved are printed in an appendix which begins at page 73.)

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Lillian I. Randall, respectfully shows:

I.

JUDGMENT OF THE SUPREME COURT OF MISSOURI INVOLVED.

Petitioner seeks to have a review of the judgment of the Supreme Court of Missouri, entered on June 23, 1941, in a certain cause entitled "Labaddie Bottoms River Protection District of Franklin County, a Corporation (Plaintiff), Re-

spondent, v. Lillian I. Randall (Defendant), Appellant," and numbered 37259 of the causes in said court.

Petitioner is the appellant in said cause. Both she and the respondent are residents of the State of Missouri.

The Opinion of the Supreme Court of Missouri is in writing, and became a part of the Court's records, as is provided by the State Constitution, Art. VI, Amendments 1890, Sec. 2; was signed by the Hon. S. P. Dalton, one of the regular Commissioners of said Court, Division No. 1, and was adopted by the Judges thereof as its opinion and judgment. The opinion has not been reported, but is set out in the certified record.

Petitioner, as appellant, and as the losing party in the State Supreme Court and within the time provided by rule of Court, filed her motion in Division No. 1 thereof for rehearing. It was overruled on July 25, 1941. The order overruling it is set out in the certified record.

Petitioner then, within the time permitted by rule of Court, filed her application to Division No. 1, under Article VI, Amendment 1890, Section 4, of the Constitution of Missouri, for transfer of the cause to the Supreme Court en banc for decision, on account of federal questions being involved, that being the highest court in the state in which a decision might be had. It was denied by Division No. 1 by order of October 30, 1941. The order of denial is set out in the certified record.

Petitioner then, and within the time permitted by order of Court, set out in the certified record, filed her petition in and to the Supreme Court en banc for its order upon Division No. 1 to transfer the cause to the court en banc, under said section of the State Constitution, for decision, on account of federal questions being involved. It was denied by order entered November 26, 1941, which order is set out in the certified record.

The judgment involved in the said appeal to the State Supreme Court was entered on the 4th day of January,

1941, in the Circuit Court of Franklin County, Missouri, the Honorable Ransom L. Breuer presiding, it being a court of original and general jurisdiction in the state.

II.

STATEMENT OF THE BASIS OF THE JURISDICTION OF THIS COURT.

The jurisdiction of this Court is conferred by Section 237 (b) of the Judicial Code, 28 U. S. C. 344 (b).

Petitioner has complied with Section 8 (a) of the Act of February 13, 1925, 28 U. S. C. 350. The final judgment of the Supreme Court of Missouri became final on November 26, 1941, when the appellant's (petitioner) petition or application to the State Supreme Court en banc for its order upon Division No. 1 for transfer of the cause to the Court en banc was denied. This petition is filed within three months thereafter.

The Supreme Court of Missouri en banc is the highest court of the state in which a decision can be had where is drawn in question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States; or where any federal question is involved (Constitution of Missouri, Article VI, Amendments of 1890, which provides for the organization of the State Supreme Court into two divisions—courts and the court en banc, and section 4 thereof, which provides that "when a federal question is involved, the cause, on the application of the losing party, shall be transferred to the Court," meaning the Court en banc, "for its decision").

Petitioner, as defendant, in the State Circuit Court, pleaded and relied upon rights under and guaranties of the Constitution of the United States, particularly under the due process and equal protection clauses of the Fourteenth

Amendment, as total defense to the claim stated by respondent, as plaintiff, for its cause (R. pp. 26-33). The federal questions so involved were such that if petitioner's contention as to any one of them had been sustained, it would have compelled judgment for her, and such that the general judgment for respondent disposing of all the issues, as it purported to do, could not have been rendered without a decision of the federal questions adversely to petitioner's contention and defense based on them.

The State Supreme Court's jurisdiction on appeal was invoked, was dependent upon and was exercised by virtue of the federal questions involved (Constitution of Missouri, Article VI, Amendment 1884, Section 6). On the appeal the federal questions relied upon as defenses in the Circuit Court, and the further federal question arising on the judgment and the circumstances under which it was rendered, was raised by motions for new trial and in arrest of judgment (R. pp. 164-165, 176, 179), that the judgment of the State Circuit Court was entered in a different cause than the one tried and was entered without hearing or opportunity therefor, and under such circumstances as to be repugnant to both the due process and the equal protection clauses of the Fourteenth Amendment, were taken to the Supreme Court for review of the Circuit Court's adverse judgment thereon. Still further questions, arising in the first instance on the opinion and judgment of the State Supreme Court, were raised and will be relied upon by petitioner herein.

All the federal questions involved in the judgment of the State Supreme Court which petitioner seeks to have reviewed are, petitioner believes, questions of substance, seasonably presented, and suggested patently on the record on which they are raised, and each, considered separately, is such a question that if petitioner's position on it be sustained, it must result in a reversal of the judgment of the state court.

III.

QUESTIONS PRESENTED.

A. Questions Arising on the Opinion and Judgment of the State Supreme Court in the First Instance.

1.

Whether the judgment of the Missouri Supreme Court, which adjudges and enforces in favor of respondent a lien upon petitioner's lands as for an annual levy on a total tax against an assessment of benefits to accrue from the making of a planned local improvement, is repugnant to the due process and equal protection clauses of the Fourteenth Amendment, respondent being a state levee district corporation exercising, by legislative delegation, by statute of general application, taxing powers limited to levies against special benefits assessed to pay the cost of a local improvement with all procedures therefor prescribed by the statute; the tax for which the lien was adjudged and enforced, however, owing its existence to judicial action expressed by the judgment in question and made to depend upon equities, as the particular chancellor conceived them to be, to the collective effect that a local improvement was planned by respondent with the intention that its cost be paid from a tax levied against special benefits and under the statute, that the improvement was made, and the tax ought to have been levied under the statute; that respondent intended to levy it, but neglected to do so; that the Court, *sua sponte*, in the statutory action at law to enforce a lien for a tax alleged to have been levied by respondent under the statute, would exercise its general equity powers to supply fatal lgislative omissions, or to make a judicial levy of the tax which ought to have been levied, and to give effect to respondent's intention to have levied it; the State Constitution providing for the usual separation of powers of government, and prohibiting exercise of powers

of taxation by the judicial branch of the government, and containing the usual guaranty of due process of law.

2.

Whether the judgment of the State Supreme Court, which adjudged and enforces in favor of respondent a lien upon petitioner's lands, as for an annual levy on a total tax against an assessment of benefits to accrue from the making of a planned local improvement which in fact was not made, is repugnant to the due process and equal protection clauses of the Fourteenth Amendment; respondent being a state levee district corporation exercising by legislative delegation by statute of general application, taxing powers limited to levies against special benefits assessed to pay the cost of a local improvement with all procedures therefor prescribed by the statute; the Court making the lien adjudged to depend upon keeping it alive, or reviving it, and transferring employment of funds to be derived from enforcement of it and the tax which it secured (if any such tax had been levied), all according to the Court's conception that the equities of the particular case included that the effect of proceedings under the taxing statute of general application be determined, in the particular case, by construing the intention of respondent, as the taxing authority proceeding under the statute, from language employed by it in the proceedings, and without reference to the effect intended and expressed by the State Legislature in the statute itself, to wit, that respondent, proceeding under and in accordance with the statute, having adopted an original "Plan for Reclamation" providing for its proposed local improvement and having caused special benefits to accrue from it to be assessed and confirmed, a tax probably having been levied against the assessed benefits to pay the cost of the improvement, but respondent not having constructed and not intending to make the improvement, and thereafter having adopted a

total "Amended Plan for Reclamation," providing for and substituting a changed local improvement and having caused total benefits to be assessed and confirmed anew on it, neither the amended plan nor the assessment on it being made in any manner supplementary of or dependent upon the original plan or old assessment, no tax having been levied against the assessed benefits to pay the cost of the improvement, and the improvement provided by the amended plan having been begun and completed under and in accordance with it, the effect of the new proceedings as accomplishing an abandonment of or superseding the old proceedings is to be determined by construing respondent's intention from items of language employed by it in the proceedings, and from surrounding circumstances of appeal to the conscience of the Court, and without reference to the legislative intent expressed in the statute, from which the Court concluded that since no tax was levied against the new assessment, a prior levy must have been made against the old assessment, that respondent did not intend that the new proceedings work an abandonment of or supersede the old proceeding, both, therefore, continued in effect, and that a tax against the old assessment would be adjudged and transferred to pay the cost of the improvement made under the new plan; the State Constitution forbidding judicial taxation, the enactment of special laws, and containing the usual guaranty of due process of law.

3.

Whether the judgment of the State Supreme Court, which adjudges and enforces in favor of respondent a lien upon petitioner's lands, as for an annual levy on a total tax against an assessment of benefits to accrue from the making of a planned local improvement, is repugnant to the due process and equal protection clauses of the Fourteenth Amendment; respondent being a state levee district

corporation exercising, by legislative delegation by statute of general application, taxing powers limited to levies against special benefits assessed to pay the cost of a local improvement with all procedures therefor prescribed by the statute; the Court refusing to consider on their merits federal questions of substance, seasonably raised, which questions were such that, if petitioner's position on them were sustained, the purported tax and lien and the judgment enforcing the same would be voided in any event; the Court grounding its refusal to consider the federal questions on their merits on its holdings, specific or in substance and legal effect, (1) that the legislative agencies through which the taxing power was exercised in the particular case—respondent, the commissioners who assessed benefits and the Circuit Court which confirmed the assessment—acquired a special personal jurisdiction of the owner of the particular lands and of the lands to exercise a taxing power over them, in conflict with the delegation, in excess of the delegation, and unequally within the delegation, by reason of petitioner's predecessor in title having been one of the landowners on whose petition respondent was incorporated, and that unless the owner of the lands should discover the intention to exercise such special jurisdiction and power at the time and prevail upon the agencies exercising it not to do so, which, not having been done, equity, sua sponte, will interpose an estoppel against any judicial inquiry, **including** inquiry under the Federal Constitution, as to the validity of the burden of the assessment, or of any tax levy against it; and (2) that prior to the raising of the federal questions, in defense of respondent's suit, and based on petitioner's complaint, the special benefits were assessed to pay the cost of a planned local improvement, the agencies to which the legislative function of making the assessment and imposing its burden upon the lands as the basis for tax levies had completed the functions entrusted to them and the assessment

had become a final legislative act, not the subject of judicial review, and that the final legislative action imposing the burden of the assessment on the lands had the effect of an adjudication against judicial inquiry, though no corresponding benefit had been provided, or as to a result of repugnancy to the Federal Constitution; and (3) that it therefore became unnecessary to consider the federal questions on their merits.

4.

Whether, under the circumstances stated in questions 1, 2 and 3, supra, the refusal of the State Supreme Court in division to transfer, and the refusal of the Supreme Court en banc to order a transfer of the cause to the Supreme Court en banc for decision, denied to petitioner due process of law and equal protection of law against the guaranty of the Fourteenth Amendment by denying her a review and decision, guaranteed to her by the State Constitution, by the highest court of the state in which a decision might be had on a matter then pending in the State Supreme Court, and by subjecting petitioner and her lands to an unnecessary and unreasonable burden, expense and delay through proceedings on this petition; the State Constitution containing the usual due process clause and constituting the Supreme Court en banc the highest court in the state to which resort might be had in a case in which federal questions are involved, and making it mandatory on application of the losing party in a division court, that the cause be transferred to the Supreme Court en banc for decision where a constitutional or federal question is involved.

B. Questions Arising in the First Instance on the Judgment of the State Circuit Court and the Circumstances of Its Rendition.

5.

Whether due process of law, on the cause tried and on the cause adjudged, and within the requirement of the Fourteenth Amendment to the Constitution of the United States, has been accorded to petitioner by a judgment of the Supreme Court of Missouri, affirming a judgment of the Circuit Court of one of the counties of the state entered in a statutory action at law tried to the Court, enforcing a claim of lien upon petitioner's lands for alleged special benefit taxes, in the circumstances that the plaintiff (respondent to this petition) in its petition for its cause of action stated facts which, if proven, would establish, prima facie, the lien claimed as having accrued upon one record of statutory proceedings therefor, on which petition issue was joined, the issues tried, resulting in total failure of proof, and proof by the plaintiff that the claim had no existence in fact, argued on written briefs and submitted for judgment; and that, thereafter, the plaintiff, over proper and timely objection and exception, was permitted to amend its petition "to conform to proof," by evidence at variance with and contradictory of the pleadings and issues tried and submitted, which had been admitted at the trial, over proper and timely objection and exception, it being evidence of a different lien accrued on a prior independent and different statutory record of proceedings, which record, if fully proven, and on claim therefor and issue joined thereon, might establish, prima facie, the lien claimed on the amended petition; and that final judgment then was entered for the plaintiff on the amended petition, without issue joined or opportunity to join issue, and without hearing, or opportunity to be heard, on the facts determinative thereof; the two records and claims being such that the

facts essential to proof of either would disprove the other; and the state statute of jeofaile permitting the Court to amend a petition after trial and at any time before final judgment to cure an immaterial variance by conforming the petition to the proof; provided the amendment does not effect a change of cause (R. S. Mo. 1939, Sec. 971); and provided the allowance of the amendment does not give effect to a misleading of or practice of deceit against the other party and leaves him in substantially the same position as if the amendment had not been allowed, is an amendment of form as distinguished from substance and does not substitute the discretion of the Court or Judge for known and fixed requisitions of procedure (R. S. Mo. 1939, Sec. 988).

6.

Whether the standard of due process and equal protection of law guaranteed by the Fourteenth Amendment, issues thereof having been made seasonably, is afforded by a judgment of the state court for respondent, a levee district corporation organized under Chapter 79, Article VII, Revised Statutes Missouri 1939, and enforcing a claimed lien against petitioner's lands for alleged special benefit taxes under said article, under the circumstances that section 12532 of said article, is a statute of general application which, in the respects in question on this petition, authorizes expressly and prescribes the proceedings for and effect of a change in or amendment of a "plan for reclamation" previously adopted by a levee district organized thereunder and for assessment of benefits anew on the "amended plan"; that the said section 12532 expressly provides that, in case such a change in or amendment of the "plan for reclamation" be adopted and allowed, and in the event benefits theretofore had been assessed on the original plan, and unless the Court, in its decree approving the amendment, shall find that the benefits will not be

changed by the change or amendment, it shall appoint commissioners to assess benefits anew on the changed or amended plan, which assessment shall be made and all further proceedings thereon had as in case of an assessment on the prior original plan, and that all taxes levied to pay the cost of the works and improvements provided for by the amended plan shall be levied against such benefits assessed specially on it; that respondent, having theretofore adopted an original "plan for reclamation" on which benefits had been assessed, and, proceeding specifically under said section 12532 (R. p. 13), adopted a total new "Amended Plan for Reclamation" which was approved by decree of Court, in which decree the Court did not find that the benefits would not be changed and in which the Court appointed commissioners to assess benefits anew on the "Amended Plan for Reclamation"; that benefits were assessed anew specifically on it (R. p. 14) and confirmed, and all the levees and other works and improvements were thereafter commenced and completed in accordance with said "Amended Plan for Reclamation" (R. p. 16); that, nevertheless, the state court so construed and applied the said statutes in the particular case that it held that the adoption of the "Amended Plan for Reclamation," the assessment of benefits anew on it, and the construction of the works and improvements under it did not effect an abandonment of or supersede the original "plan for reclamation," and the prior assessment of benefits on it in the particular case of the petitioner's lands since respondent did not intend the proceedings under the statute to have that effect, and since the two assessments happened to result in identical amounts, and it would not affect petitioner inequitably to enforce the one over the other, but that both plans and both assessments continued in force, and that a tax might be levied against the benefits assessed upon the original "plan for reclamation," under which no improvement had

been constructed, to pay the cost of making the special improvements provided by and constructed under the "Amended Plan for Reclamation"; that, on the said holding, the state court further held that respondent properly might sue to enforce a lien, stating facts specifically alleging as its cause a claim of lien wholly accrued on procedings alleged to have been had exclusively and step by step under the statute on the amended plan and benefits assessed on it, and, after trial and submission of the cause, no element of waiver by petitioner being present, might amend its petition to state a cause of claim of lien accrued exclusively and step by step on its original plan and the prior assessment had on it, without effecting a change of cause, and then have judgment on the merits on the amended petition without issue joined thereon, and without hearing or opportunity to petitioner to join issue or be heard; the State Constitution containing the usual due process section, a section prohibiting enactment of a special law where a general law could be made applicable, and a section prohibiting judicial taxation; the State Civil Code permitting post-trial amendment to cure an immaterial variance, providing it doesn't effect a change of cause, and requiring opportunity to be afforded to the opposite party to plead to a petition as amended, after amendment, at any stage of the proceeding.

C. **Federal Questions Raised in the First Instance on Petitioner's Answer to Respondent's Petition on Which a Trial Was Had.**

7.

Whether the judgment of the State Court effects a denial to petitioner by the state of equal protection of its laws, within the prohibition of the Fourteenth Amendment, under the circumstances that it enforces a claimed lien for an alleged tax levied against petitioner's lands

by respondent in the exercise of a limited taxing power delegated by statute of general application, which by the express terms of the delegating statute can be exercised only upon special benefits assessed to accrue from a local improvement provided for in a written officially adopted "plan for reclamation" and consisting of a system of levees and incidental improvements to protect lands from overflow; and that the statute expressly limits the delegated power to exclude an assessment and tax on any other basis, or in excess of such benefits, and provides for classification of lands within the district for the purpose of assessment accordingly as they will or will not be so benefited and protected; that petitioner's lands are within the respondent's corporate boundaries, which were determined in the first instance by the landowners, including petitioner's predecessor in title, on whose petition respondent was incorporated, in execution of a common purpose to have all the lands within the said boundaries protected from overflow by the Missouri River by enclosing them within a system of levees with incidental protection works; that petitioner's lands constitute an island in the Missouri River separated from the other and shore lands constituting the district by a wide slough, recently an arm or branch of the river, but at the time in process of filling rapidly, through which the river still flowed at stages a few feet above low water; that upon its incorporation and after having made necessary actual surveys and estimates, respondent concluded that it would not be practicable to construct any system of levees and incidental improvements which would include enclosing and benefiting petitioner's lands, for the reason that the cost of constructing adequate levees across the slough from the mainland to the island at both ends of the island would be prohibitive; that respondent thereupon adopted an official "plan for reclamation" which located the levee and all incidental improvements on the mainland and left both the

island and the slough, between it and the mainland, to be wholly unaffected by the plan; that thereafter neither petitioner's predecessor in title nor petitioner participated any further in the proceeding or the affairs of the district; that nevertheless petitioner's island was assessed on a parity with lands on the mainland of like elevation, and provided to be enclosed within and protected by the levees and incidental works; that in making the assessment of benefits respondent and the commissioners wholly disregarded the requirement of the taxing statute that lands be classified accordingly as they would be or would not be benefited, and adopted and applied a conflicting standard of classification of all lands within its corporate limits according to elevation only, and arbitrarily assessed them accordingly and without regard to whether or not they would be benefited, which assessment included an arbitrary assessment against petitioner's lands equal in amount to that against the other lands of like elevation provided to be enclosed within and protected by the levees and incidental protective works; it being the rule of law of general application in the state that a legislative agency exercising taxing power by delegation must exercise the power strictly within the terms of the delegation, and that any attempted extension or expansion of the power or its exercise, and any tax so attempted to be levied is void, and that a special tax for a local improvement can be sustained only if supported by a corresponding special benefit in excess of any benefits which would accrue to the public there generally.

IV.

A SUMMARY STATEMENT OF THE MATTER INVOLVED.

Respondent is a Missouri Levee District Corporation, organized under what is now Chapter 79, Article VII, Sections *12492 to 12547, inclusive*, Revised Statutes Missouri 1939. Petitioner is the owner of lands constituting an island in the Missouri River, included within respondent's corporate limits, but not provided to be enclosed nor enclosed within its levees, nor included within the scope of improvements incidental thereto.

Broadly stated, this petition presents questions of the validity of said judgment of the state court under the Constitution of the United States and the questions of whether or not the standard of due process of law and equal protection of law guaranteed by the Fourteenth Amendment contemplates that a particular defendant have judgment entered for or against him in a civil cause, on the issues tried, after trial and submission in a state court of general jurisdiction and on the cause tried; or whether, after such trial and submission, no element of waiver being present, the plaintiff may change his cause and have judgment on the new cause without issue joined or hearing or opportunity therefor, particularly where the State Constitution and laws contain provisions of general application that in the first-named situation judgment be entered and in second-named situation judgment may not be entered for the plaintiff; or whether, where a particular statute of general application delegates to a quasi-municipal corporation limited taxing powers to be exercised exclusively upon a tax levy against an assessment of special benefits to accrue from construction of a special local improvement and prescribes the manner of exercising the power and the procedures therefor, the power must be exercised within the limits of the delegation, in the manner provided by the statute and

through procedures in substantial conformity with, and with the effect of those provided by the statute; or whether a tax based on special benefits to be derived from a local improvement must not be imposed arbitrarily in the absence of a corresponding benefit, nor in an amount grossly disproportionate to the benefit; or whether multiple assessments may be made and retained in effect in contemplation of a single improvement; or whether, where the taxing statute provides the effect of a particular procedure had in its execution, the procedure must be given effect according to the legislative intent expressed by the statute, and may not be given a contrary effect in a particular case, according to the intent of the legislative agency without effecting a result of special judicial legislation and taxation by the judicial branch of the state government; or whether confirmation of the assessment by a court acting as the legislative agency to which that function is delegated operates as *res adjudicata* against judicial inquiry as to whether or not the result of the legislative action satisfies specific requirements of the federal Constitution; or whether a federal question which, if sustained, would control the disposition of the cause, when seasonably raised in a state court having jurisdiction to decide it, must be decided by that court on its merits.

Petitioner does not question that said chapter 79, article VII, and the several sections constituting the same, are fair on their face and that, if administered according to their terms, the result accomplished would be unassailable on constitutional grounds. Petitioner does not question that the proceedings in evidence had for the incorporation of respondent, and the further proceedings pleaded by respondent and relied upon by it for its cause of action stated in its petition on which trial was had, in so far as they are in evidence, are in form sufficient. As to the other proceeding pleaded and relied upon by respondent in the petition, as amended after trial, and on which the judgment was en-

tered without issue joined or hearing, petitioner is not informed and doesn't know whether or not they were sufficient, even in form, to constitute a compliance with the said statute.

Petitioner's complaint against the state statute is that it and proceedings had under it have been so construed and applied, as respects petitioner's lands only, as to produce an unconstitutional result.

Respondent was incorporated on the petition of the owners of the majority of the lands within the boundaries of a proposed levee district, which boundaries upon respondent's incorporation in fact were established as its corporate boundaries. Petitioner's predecessor in title was one of the signers of the petition on which respondent was incorporated. The signers of said petition associated themselves for the purpose of providing for the protection of their lands, theretofore subject to overflow by the Missouri River, by enclosing them within a system of levees and incidental protective works. Recourse to the incorporation and organization of respondent was had in order that all the lands in the area included within the said boundaries, both lands belonging to the signers of the petition and lands belonging to other persons, might be protected as a unit by the proposed levees, and in order that the cost of the improvement, through exercise of the limited taxing powers delegated to the district by the general provisions of said statutes, be imposed ratably, according to benefits, upon all of the lands within the said boundaries which, in fact, would be protected by any levees and improvements incidental thereto, undertaken to be constructed by respondent.

It is provided by the said article and chapter that, after the incorporation of the levee district, it incorporate the works and improvements which it proposes to undertake into an officially adopted written "Plan for Reclamation," accompanied by explanatory maps and drawings (sections

12502 and 12503), and that the works and improvements to be undertaken by it be limited to those set forth in the plan and be paid for out of funds derived exclusively from taxes levied against benefits assessed upon lands to be benefited by the construction of the levees and incidental improvements undertaken under its "Plan for Reclamation" (sections 12519 and 12511). It is then provided that the taxing power delegated to the district be exercised in the following manner:

Commissioners are appointed by the Circuit Court in which the district was incorporated to make an assessment of special benefits to accrue to the several tracts of land from the construction of the levees and incidental works and improvements provided for in the "Plan for Reclamation" (section 12505). The district, through its secretary, furnishes to the commissioners a complete list of all lands in the district which will be so affected by construction of the levees and other improvements in which, for their guidance in assessing benefits, the lands are classified accordingly as the secretary considers they will be benefited or not benefited (section 12506). The commissioners in making the assessment of benefits are forbidden expressly by the statute to take into consideration benefits which might accrue from any other source, or to assess any benefits except such as will accrue from the putting into effect the "Plan for Reclamation," or as the same may afford protection of the lands from overflow (section 12507).

Upon the commissioners having made their assessment, they make a report of the same in detail, as provided by the statute, to the Court. Publication notice of the filing of the report is given. Exceptions may be filed to any assessment of benefits. The exceptions are disposed of in a summary manner, and the report of the commissioners is confirmed by the Court. A certified copy of the decree containing a list of the benefits as confirmed then is filed with the Recorder, where it becomes a permanent record,

and the resource against which all taxes levied by the district must be made (section 12509).

In performing said functions the district, its officers, the commissioners and the Circuit Court all are acting as agents or agencies of the legislative branch of the State Government, to which branch all power of taxation is committed by the State Constitution, Article III.

No appeal is permitted from the assessment so confirmed (section 12509).

The first opportunity afforded by the said article for testing the validity of the assessment in a judicial proceeding, particularly for testing it on constitutional grounds, is in an action at law to enforce an annual installment of the total tax levied against it, such as is the action in which the judgment was entered which petitioner seeks to have reviewed.

After the list of assessments and confirmed benefits have been filed in the Recorder's office, the levee district makes a total tax levy against it sufficient to pay the estimated cost of constructing the levees and incidental improvements, provided for in the "Plan for Reclamation" (section 12511). A lien therefor, and for all annual levies of installment tax thereof, and all maintenance tax levied thereon, is then perfected by extending and certifying the said tax levy in a book to be known as the "Levee Tax Record," and filing the same in the office of the Recorder of Deeds, from the time of filing which, and not before, the lien for the tax levies attaches to the lands (section 12516). The statute then provides that payment of the tax so levied may be deferred by the issuance of bonds, and appropriation specially to their payment of such part of the total tax levy as may be necessary, and then for the levy of annual installments of the appropriated part of the total tax levy sufficient to meet bond maturities, and the levy of an annual maintenance tax, based upon the confirmed benefits, as filed in the Recorder's office, and that

the said annual levies may be enforced by civil action brought in the name of the district to enforce the lien therefor against the lands. The suit in question was, in form, such a suit.

Petitioner's lands constitute an island in the Missouri River, separated from the mainland by a wide slough, formerly an arm of the river, which, however, had been filling and was filled to the extent that, at low water stages, the river did not flow through it, but still flowed through it at a stage of the river a few feet above low water. (See plat, R. p. 98.) When respondent had caused to be made the necessary surveys and the estimates of cost preliminary to its adoption of its official "Plan for Reclamation," it found and concluded that it could not carry out the intention of the landowners on whose petition it had been incorporated to enclose within its levees all the lands within its corporate boundaries, for the reason that the cost of building its levees across the slough at both ends of petitioner's island so as to enclose the island and intervening slough within its levee would be prohibitive. Respondent then adopted as its official "Plan for Reclamation" a plan which provided that the mainland only be enclosed within the levee, and that the levee be located on the high bank of the river along the south side of the slough, across which and to the north of which lay petitioner's island, which "Plan for Reclamation" wholly excluded petitioner's island and the slough between it and the mainland from any protection of the levees, or of any of the proposed works incidental thereto, and left the island and slough wholly in their natural state, except for the possibility that they might be subjected to a greater and more direct controlled burden of flood waters, due to the effect of the proposed levee to confine flood waters within narrowed limits.

The Missouri River, as is well known to anyone reasonably well acquainted with it, is not merely a large water

course, but is a mighty stream of most irresponsible behavior, addicted to violent changing of its course, channels and currents, regardless of restraints, natural or artificial, when at flood stages. In times of high water it is a turbulent, madly rushing torrent of mud, a thick mixture of water and silt and fine sand, cutting and tearing at its shores, valleys and islands, tearing down here and building anew there at will and with unequaled abandon. This it has done throughout the ages, and, within the memory of man, river and valley have exchanged positions, in many instances several times. Every particle of silt and sand of which its valleys and islands are constituted was carried and deposited there by its waters, and is subject ever to the threat of being torn away again to repeat the adventure to rest again at another place. One could not imagine an area of arable land being in a more precarious situation than that of a "river-made" island in the Missouri River, without artificial defense against encirclement, attack and destruction by the violence of its greedy waters when on flood "rampage." There is an old story of a native timberman with a little ambition, some ingenuity and a touch of imagination, who, not possessed of a grindstone, kept his tools at a fine edge by holding them in the Missouri River against the grinding power of the fine sand borne in its raging waters.

In this suit respondent pleaded facts showing, and it is fully admitted by petitioner (R. pp. 23-24), was proven at the trial by respondent's competent documentary evidence (R. pp. 62-98), and was so found by the Court (see opinion), that respondent first adopted a "plan for reclamation" on which benefits were assessed and confirmed in April, 1924, in form as required by the statute, which included an assessment against petitioner's lands (R. pp. 12, 55-56). Respondent then pleaded facts showing (R. pp. 13-20), which likewise were admitted, proven and found, that it then and thereafter, about the first of Oc-

tober, 1924, changed and amended its "Plan for Reclamation" under section 12532, in order to include within the protection of its levees and incidental improvements, additional lands and to exclude therefrom other lands, and otherwise change the proposed system of levees and incidental improvements (R. pp. 62-99); that commissioners were appointed under said section 12532 to assess benefits anew thereon (R. pp. 100-102); that benefits were assessed and confirmed de novo upon the changed "Amended Plan for Reclamation" so adopted (R. pp. 103-110), all in form as provided by the statute; that this assessment of benefits also included an assessment against petitioner's lands, which, in fact, proved to be in the same amount as had been the prior assessment on the original plan, and that all the levees and other works "were thereafter begun and completed under and in accordance with the 'Amended Plan for Reclamation' " (R. pp. 16, 24). Respondent then pleaded facts which, if true and established, would show that it had taken, step by step, as provided by the statute, all further proceedings required by the statute, all based specifically upon its said "Amended Plan for Reclamation" and the benefits assessed thereon, to accrue the claimed lien in suit. Petitioner in her answer denied that any of said further proceedings were had, and denied that plaintiff had adopted a plan or an amended plan which provided for benefits to petitioner's land (R. p. 24), or had secured to be made a valid assessment of benefits against them. At the trial it was established affirmatively by respondent through its evidence that none of the said further proceedings in fact were had, even in form (R. p. 129. Note: All documents put in evidence after Ex. 19, R. p. 111, were on the original plan and admitted over objection and exception.) Respondent put in evidence, as its proof on the issue of benefits, both its original "Plan for Reclamation" and its "Amended Plan for Reclamation," from which it appears that both plans wholly

excluded petitioner's lands from protection of the proposed levees and all incidental or other improvements. Petitioner's answer also pleaded facts constituting the defense that the assessment against her island was repugnant to the Constitution of the United States in several respects (R. pp. 25-33), particularly that it was invalid under the guaranties of the due process and equal protection clauses of the Fourteenth Amendment (R. pp. 32-33).

The said taxing statutes of chapter 79, article 7, provide that in assessing benefits to lands in the district the lands shall be classified primarily as they will be, or will not be, benefited from construction of the levees and other and incidental works provided for in the "Plan for Reclamation" (Section 12507). In the particular case respondent and the commissioners disregarded the provision of the statute of general application for so classifying the lands and adopted and applied a special and unauthorized classification under which it classified them solely on the basis of elevation, without regard to whether or not they would receive any benefit from the levees and incidental works provided to be constructed. As a result of employing this classification for making its assessment, an assessment of benefits was made in both cases against petitioner's lands and in both cases arbitrarily in an amount on substantial parity with assessments made against other lands in the district of like elevation, and which were provided to be enclosed within the proposed levees and afforded protection by the levees and incidental improvements provided in the plans.

A trial was had on the facts, which resulted both in a failure of proof on the part of respondent and in the establishment affirmatively by respondent, by its evidence in chief, that the claimed lien in suit had no existence in law or fact for the reasons: That respondent put in evidence in proof on the issue of benefits to plaintiff's lands the "Plans" themselves, which showed the facts with respect

to petitioner's lands, as above stated; and further proved, and it was so found by the Court, by documents constituting the record of its procedures under the statute (R. p. 111), and proof of the nonexistence of other such records (R. p. 129. Note: All documents put in evidence after Ex. 19, R. p. 111, were of proceedings on the original plan, and old assessment, and were admitted over objection and exception); that it had proceeded no further toward accomplishing the claimed lien in suit than to have the confirmation by the Circuit Court, acting as a legislative agency, of the assessment of benefits on the "Amended Plan for Reclamation" (R. p. 111), and had not filed the same in the Recorder's office (R. p. 129), had not made any levy of total tax against it, nor perfected any lien for any total tax levy or annual levy thereon. (See State Supreme Court's opinion.)

The case was submitted for judgment on respondent's evidence (R. pp. 159-160). Thirty-five days later, on the last day of the term, the Court convened to pronounce judgment (R. p. 161). At that time respondent was granted leave, over timely and proper objection and exception of petitioner, to amend its petition (R. p. 151) and change it to state a claim of lien based wholly upon its original "Plan for Reclamation" and the old assessment of benefits confirmed on it, and it was so found by the Court, both of which, necessarily and by provision of the statute, were abandoned by adoption of the total new plan, the assessment of benefits de novo on it, and the construction of all levees and other incidental improvements under it (Section 12532). The amendment was made purportedly to conform to proof by some evidence, admitted at the trial, at total variance with the issues and over proper and timely objection and exception of petitioner, of proceedings had by respondent, further than those pleaded, and based on its original plan and the old assessment of benefits thereon, and prior to respondent's adop-

tion of its "Amended Plan for Reclamation," and the assessment of benefits in it (see colloquy, R. pp. 127-128; see opinion Supreme Court of Missouri), and of some proceedings had subsequently thereto purporting to make an annual levy of installment and maintenance taxes and not made referable to either plan or to either assessment particularly, the truth, probative value, or any matter of defense to said evidence not having been put in issue and not having been tested at the trial.

Petitioner then moved to strike the petition for departure (R. p. 162). The motion was denied. Petitioner excepted. Judgment then, on the same day, was rendered on the merits on the petition, as then amended, without issue joined, or opportunity to join issue, and without hearing, or opportunity to petitioner to be heard (R. p. 162).

In her motions for new trial and in arrest of judgment petitioner raised the issue that the judgment entered under the circumstances was repugnant to the due process clause of the Fourteenth Amendment, when considered either on the case which was tried and submitted and not decided, or on the case on which issue was not joined or tried, and on which the judgment was rendered (R. pp. 163-167). The motions were overruled. Petitioner excepted and appealed to the Supreme Court of Missouri. Jurisdiction of that Court was invoked on the ground that the federal and constitutional issues were involved. The Supreme Court took jurisdiction.

Conclusions and Holdings of the State Supreme Court.

The State Supreme Court rendered its opinion and judgment in writing as is required by the State Constitution, Article VI, Amendment 1890, Section 2, in and by which it affirmed the judgment of the State Circuit Court in all respects.

Specifically, or by necessary implication, and in substance and legal effect, the State Supreme Court, in its opinion included and applied the following holdings and conclusions, each of which petitioner believes brings its judgment into conflict with the equal protection or due process clause, or both of them, of the Fourteenth Amendment:

1. That whether or not the judgment rendered by the Circuit Court denied to petitioner due process of law depends upon whether or not the post-trial amendment of respondent's petition was authorized by the procedural statute, Chapter 6, Article VI, R. S. Mo. 1939, particularly Section 971, the State Statute of Jeofails; which, in turn, depended upon whether or not respondent held the substantive right to have sued in the first instance on the cause stated after the amendment; which, in turn, depended upon whether or not the adoption by respondent of its total "Amended Plan for Reclamation" specifically under section 12532, the assessment of benefits in toto and de novo on it, and the construction of its works under and in accordance with the "Amended Plan for Reclamation," effected an abandonment of or superseded the original "Plan for Reclamation" and the old assessment of benefits on it; and which, in turn, depended upon the intention of respondent to be construed from items of language used by respondent in its petition filed under section 12532 on which the proceedings under section 12532 were instituted, and without reference to the legislative intent expressed in the statute, of general application, itself. So construing the effect of the proceedings, the Court concluded that respondent did not intend to abandon the original plan and old assessment and that therefore and on other equitable considerations, it did not abandon them, and, therefore, respondent might have based its suit on the original plan and old assessment in the first instance and, on failure of proof at the trial, on the petition and claim based on the amended

plan and new assessment on it, properly was allowed to amend to state a cause based on the original plan and old assessment, and to have judgment thereon without issue joined or trial, no element of waiver being present. The Court supported this conclusion and holding by what it deemed to be the equities that in any event the two assessments were in the same amount; that the improvement was made, and ought to be paid for by a tax, which could be done only by keeping alive the alleged tax against the original assessment and enforcing it on equitable considerations, to pay for the improvement made under the amended plan for which benefits had been assessed specially, but against which a tax had not been levied, due to mistake or neglect of the taxing authority, respondent, equitable relief against which the Court, sua sponte, ought to award.

2. On the original question of whether or not a purported special benefit assessment had been imposed upon petitioner's lands without provision for corresponding benefit, or arbitrarily in excess of benefit provided, the Supreme Court held that it could not say one way or the other what should be the answer on the facts, but that an answer on the facts was unnecessary; that the question was not an open one, because the taxing authority, the Court, had a special jurisdiction over the particular lands, by virtue of petitioner's predecessor in title having been one of the petitioners on which respondent was incorporated, to tax the particular lands with an uneven hand; that petitioner and her predecessor had slept on a duty to guard against special and unequal taxation; that they, in equity, could not be heard to complain in a judicial proceeding that the burden was imposed in contravention of statutory authority or with a result repugnant to the Federal Constitution; and that the final legislative act of imposing the burden having been accomplished in form as provided by the statute, it had the effect of *res adjudicata* against judicial inquiry as to valid-

ity of the result or repugnancy thereof to the Federal Constitution.

3. The Court held that facts relied upon as giving rise to and controlling of federal questions do not become the subject of first instance inquiry in determining those questions on the merits; that in determining federal questions the Court cannot look into facts back of, or other than final action by the State Legislature or state court, and cannot impeach the validity of final state judicial or legislative action for repugnancy to the State or Federal Constitution; and that, therefore, it was unnecessary to consider the federal questions presented, on their merits.

V.

STATE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The statutes of the State of Missouri most fundamentally involved are:

Chapter 79, **Article** VII, "Organization of Levee Districts by Circuit Courts," Sections 12492 to 12547, inclusive, **Revised Statutes** 1939; the same appearing as Chapter 64, Article VI, Sections 10902 to 10957, Revised Statutes 1929. The sections of said chapter and article directly involved in consideration of the questions presented on this petition are set out in the appendix hereto, and the subject matter of the sections not directly involved is there indicated. The numbering there employed is that of the Revised Statutes 1939. Since the suit was instituted at a time when said Revised Statutes 1929 were in force, we have followed, for convenience of reference, each section number with the section number it bore in the Revised Statutes 1929. Chapter 79, Article VII, is one of two independent state statutes, both articles of the same chapter, in pari materia and closely parallel in form and pro-

visions. The other statute is Chapter 79, Article I, "Organization of Drainage Districts by Circuit Courts," Sections 12324 to 12389, inclusive. Article VII has the primary purpose of providing for reclaiming lands from overflow by construction of levees, with the incidental purpose of rendering the levees effective and secure through providing drainage and protection against bank wash and erosion. Article I has the primary purpose of providing for reclaiming lands from the effects of water by constructing a system of drainage, with the incidental purpose of rendering the drainage system effective and secure through providing for protective levees, and other incidental works. A levee district organized under Chapter 79, Article VII, is a quasi-municipal corporation vested with right of eminent domain, and to which the State Legislature has delegated, by the statute of general application, limited powers of taxation restricted to be exercised wholly upon benefits assessed to be derived from making the local improvement undertaken by it, and with the limits and scope of the authority and the procedures through which it may be exercised, step by step, all stipulated in the delegating statute.

Section 12532 of **Chapter** 79, **Article** VII, is a remedial taxing statute, which directly or indirectly is involved in each and all the federal questions involved, stated supra. It is a section included in the article to meet the situation when, at any stage of proceedings based on the district's original "plan for reclamation," it shall be found necessary or desirable to change or amend the plan. The federal questions presented on which section 12532 is involved arise out of or are related to the effect of respondent's having adopted through proceedings had under that section specifically, a total "Amended Plan for Reclamation" on which benefits in toto and de novo were assessed and confirmed, but against which defendant failed and

neglected to levy a tax and under and in accordance with which amended plan all the works constructed by respondent were begun and completed, as effecting an abandonment of or superseding the prior original "plan for reclamation" and the old assessment of benefits made and confirmed on it and all further proceeding had on it, if any in fact were had, which question of fact was neither put in issue nor tried. Section 12532 provides that a levee district organized under Article VII may change or amend its "plan for reclamation" by petitioning the Circuit Court, in which the district was organized, for its approval and that, if approval be given, and in case benefits have been assessed on the original plan, then, unless the Court in its decree granting the approval shall find that the benefits will not be changed by the changed or amended plan, the Court shall appoint commissioners to assess benefits anew on the changed or amended plan, and that all further proceedings shall be had anew thereon as in case of an assessment on an original plan.

Certain provisions of the Constitution of Missouri and others of its statutes are involved. They, also, are set out in the Appendix to this petition, with the section numberings as the same appear in Revised Statutes Missouri 1939, and are:

Constitution of Missouri, Article III, providing for distribution of powers of state government;

Constitution of Missouri, Article II, Section 30, the due process of law section;

Constitution of Missouri, Article II, Section 20, prohibiting the state's taking of private property for private use;

Constitution of Missouri, Article IV, Section 53, prohibiting enactment of special laws whene a general law can be made applicable;

Constitution of Missouri, Article VI, Amendment 1890,

Sections 2 and 3, providing for organization of State Supreme Court into two division courts and the court en banc, and requiring written opinions and making them a part of the Court's record;

Section 4, providing for transfer of causes from a division court to the court en banc, for decision;

Constitution of Missouri, Article VI, Amendment of 1884, Section 6, vesting Supreme Court with exclusive appellate jurisdiction where a constitutional or federal question is involved;

Revised Statutes Missouri 1939, Chapter 6, Article V, Section 916, a section of the Civil Code providing for content of a plaintiff's petition; and

Section 920, providing for the defendant's pleading; and

Article VI, Section 969, defining what shall constitute a variance; and

Article XVI, Section 1167, providing what constitutes failure of proof and its consequences; and

Article VI, Section 970, providing for proceedings on immaterial variance; and

Section 971, providing that a pleading may be amended at any time before judgment to cure an immaterial variance; and

Section 982, providing that upon any amendment to any pleading the opposite party shall be allowed opportunity to answer or reply to the pleading as amended; and

Section 987, providing that article VI shall apply to all civil actions; and

Section 988, a statement of principles and rules to be observed by courts in construing sections of the Civil Code.

VI.

REASONS RELIED UPON FOR WRIT OF CERTIORARI.

A.

The decision and judgment of the state court is repugnant to the due-process and equal-protection clauses of the Fourteenth Amendment for each of the reasons following, and under the holdings of this Court in the cases cited: (For convenience of reference, the paragraph numbering is made to correspond to the number of the "Questions Presented," supra; and reference is made to authorities on the same numbered errors assigned in the accompanying brief.)

1.

By Article III of the State Constitution all power of taxation in Missouri is vested in the legislative branch of the state government exclusively. The judgment of the state court, in its effect of enforcing a purported tax lien upon petitioner's lands, enforces a lien which by the decision is made to depend, for its existence, validity and the application to be made of the proceeds to be derived from its enforcement, upon action by the judicial branch of the government, according to its conception of the equities of the particular case, expressed and given effect through the judgment and decision itself, and constitute both an assumption by the judicial branch of state government to exercise, applied to the particular case only, the power of taxation committed exclusively to the legislative branch (Const. Mo., Art. III), and an enforcement of a purported lien for a void purported tax upon petitioner's lands. In both respects the judgment is void for lack of authority over or jurisdiction of the subject matter and operates to deprive petitioner of her property without due process of law.

(b) It is the prerogative of the State Legislature itself to determine to what extent and with what effect it will delegate its power of taxation, and the manner of exercising the same. The agent or agency to which any power of, or power with reference to taxation is delegated must keep within the letter of the delegation in the exercise of the power, and any attempt by the agent or agency to extend or expand his authority is without process of law and is void, as is the result attempted to be accomplished thereby.

2.

(a) The legislative branch of the state government in Missouri may delegate to agents or agencies specific powers of or powers with reference to taxation. By Chapter 79, Article VII, Revised Statutes 1929, a statute of general application, powers with reference to taxation are delegated to the levee district (respondent), commissioners appointed to assess benefits and the Circuit Court, and the sum of the powers delegated to the three agencies is the exercise of total taxing power within the limited scope of a tax levy against an assessment of special benefits to accrue from the making of a particular local public improvement. The function delegated to the Circuit Court is that of an agency for review of the assessment made by the district and commissioners, that is, to afford to the landowner an opportunity for legislative hearing and to complete the legislative action. In the respect that the Court in its decree under section 12509 confirms the assessment of benefits, the Court functions strictly as an agency of the legislative branch of government and the decree expresses legislative action. The judgment of the state court, in its holding that the confirmation, under section 12509, of the assessment of benefits foreclosed inquiry as to corresponding benefits (Opinion, page 10) under the federal question thereof on the Fourteenth

Amendment (Opinion, page 11) effects a holding that a completed act of the State Legislature bars, or operates as an adjudication against, inquiry as to its own validity under the Federal Constitution, and the judgment denies to petitioner benefit of the Constitution of the United States and due process of law.

(c) The intention of the State Legislature as expressed by it through section 12532 is exclusively the criterion by which the effect of proceedings under the section may be determined. The judgment of the state court, in its holding that the effect of respondent's having adopted a total "Amended Plan for Reclamation," proceeding expressly under section 12532, and of benefits having been assessed in toto and de novo on it, as accomplishing an abandonment of or as superseding its original "Plan for Reclamation" and the old assessment of benefits on it, is to be determined by construing the intention of respondent from language employed by it in the proceedings under the statute and without reference to the legislative intention as to their effect, and as expressed through the statute, operates to extend authority of the taxing agency beyond the scope of the delegation, to make and apply a special construction of the statute in the particular case, and an attempt to exercise the taxing power by the judicial branch of government, is without process of law, void and effects a denial by the state to petitioner, both of due process of law and the equal protection of its laws.

(d) By giving effect to the intent of the State Legislature, expressed by it through section 12532, respondent's original "Plan for Reclamation" and the old assessment of benefits on it was abandoned and superseded, in fact, by operation of law. There is no provision in the statute for retaining in effect or reviving the old plan or assessment. Section 12532 quite clearly expresses a legislative intention that the amended plan and new assessment must

be substituted for the old plan and assessment, and that the latter becomes functus officio. To give any other effect to the legislative intent would convict the State Legislature of intending an effect approximating the absurd, certainly intending an effect of confusion of rights and liabilities and of doubtful constitutionality; there would be two official total plans simultaneously in force, when but a single improvement is contemplated; the lands would be burdened with two total assessments, when but one corresponding benefit was contemplated, or in fact possible; under the decision of a state court that a tax might be levied against either assessment to pay the cost of an improvement made under the other plan, the land would be burdened with a special benefit tax without a corresponding benefit and imposed without relation to the benefit. Accepting the fact of the abandonment by substitution, the judgment of the state court enforcing the claim of lien for an alleged tax levy against the old assessment of benefits constitutes an attempt to revive it by judicial action, and, therefore, attempted judicial taxation, adjudges enforcement of a pretended tax which in fact and law had no existence, and effected a denial by the State to petitioner of both due process of law and equal protection of its laws.

3.

(a) It is the duty of the state court to decide on their merits federal questions of substance seasonably raised, and which, if sustained on their merits, would control the judgment to be rendered in a cause. A failure of the state court to decide such federal questions operates to deny to the litigant raising them benefit of the Federal Constitution and a hearing on rights claimed under it.

(b) The decision of the state court that petitioner was estopped in equity to invoke benefit of the Federal Consti-

tution to test the validity of the tax by virtue of petitioner's predecessor in title having been one of the persons on whose petition respondent was incorporated, the statute itself making no distinction between lands of such petitioners and the lands of nonpetitioners as to the taxing powers delegated, makes and applies an unilateral construction of a mutual contract obligation, constitutes attempted taxation by the judicial branch of the Government in equity by estoppel, and an unauthorized exercise of taxing power, and contrary to the delegating statute of general application.

4.

(a) When having refused to decide the federal questions involved on their merits, Division No. 1 of the State Supreme Court rendered its judgment against petitioner, and both it and the Court en banc, on petitioner's application therefor, refused to transfer the cause to the Court en banc for decision, the Court denied to petitioner specially a right of substance and a hearing secured to her by the State Constitution, Article VI, Amendment 1890, Section 4, and applies the State Constitution unequally and against petitioner.

(b) In that respect the situation in the instant case is the antithesis of that before this Court in

> State v. Moore, 159 U. S. 675, 16 S. Ct. 179, 40 L. Ed. 301, affirming 121 Mo. 514, 26 S. W. 345;

in which the Division Court had decided the federal questions on their merits, and the Court held that the decision was right, so that the refusal to transfer could not have prejudiced the petitioner, or constitute a denial of due process of law.

B.

5.

(a) The question of change of cause by amendment is one of procedural law in no way dependent upon the truth of the constitutive facts stated by the pleader, or upon the pleader being possessed of the right alleged. Inherently and by statutory provision in Missouri, an amendment of a pleading after trial and before judgment "to conform to proof" may be allowed only to cure an immaterial variance, allowance of any amendment of broader scope after trial deprives the opposite party of a hearing, the circumstances that the amendment is made after trial eliminating opportunity to be heard.

(b) In the circumstances that respondent in its petition on which trial was had and the cause submitted alleged facts and proceedings of a taxing authority, which, if proven, would establish a lien for a special benefit tax accrued through compliance, step by step, with the procedures therefor established by statute, and that the trial resulted in total failure of proof of the cause as alleged; and that after the post-trial amendment the petition as amended stated a similar cause accrued through like but prior and wholly independent proceedings under the same statute; and that the two causes were such that the facts necessary to prove either would as effectively disprove the other; and that judgment was entered on the petition as amended without issue joined or hearing or opportunity for either, does not present a case of amendment to cure an immaterial variance, but one to supply total failure of proof and allowed on considerations of alleged substantive right rather than of procedural law, and presents an extreme case of condemnation without hearing.

6.

(a) Where the federal question presents the issue denial of equal protection of law and must be determined from a comparison of the state statute of general application with the construction or application of the statute, or the rule of law adopted and applied and within the operative scope of the statute, in the particular case, this Court makes its own construction of the general statute or law and of the alleged special construction and application for purposes of comparison.

(b) Under the Missouri Code of Civil Procedure, Chapter 6, Article VI, a plaintiff may be allowed, post-trial, an amendment of his petition to conform to the proof by curing an immaterial variance; a variance as to a constitutive fact of the cause stated in the petition is not immaterial. If any amendment of the petition be made, even when made at or before trial, the defendant shall be allowed opportunity to plead to the petition as amended; but where a constitutive fact to which proof is directed is unproved in its entire scope and meaning it is not a variance but a failure of proof, and will not support a judgment for the plaintiff. The precise nature of the charge must be apparent from the petition. The plaintiff is conclusively bound by allegations of fact in his petition on which the case is tried, and must stand or fall on the facts stated in his petition as constituting his cause, according to the proof thereof, and regardless of the truth or falsity in fact of the facts or charge. The allowance to respondent of the post-trial amendment of its petition constituted an attempt to cure a failure of proof of the constitutive facts stated in the petition on which the case was tried, by a change to a statement of contradictory constitutive facts constituting an inconsistent cause, and the judgment was entered contrary to the proof on the constitutive facts tried. The result may be viewed either as a special construction and application of the Civil Code, or as a denial

to petitioner of benefit of the Civil Code or independently of the Civil Code as repugnant to the concept of due process of law; in any view taken of it the result singles petitioner out, and applies to her only, and adversely, special rules of procedural law operating to deprive her of substantive rights and by means repugnant to the most elementary concepts of due process of and equal protection of law.

7.

(a) By virtue of the limited scope of the power of taxation delegated, of the express restrictions imposed by the State Legislature upon its exercise by the legislative agencies to which the power is delegated by chapter 79, article VII, and under the due-process and equal-protection clauses of the Fourteenth Amendment, lands within respondent's corporate boundaries could not be subjected to an assessment or levy of tax thereon except for a corresponding benefit provided by the plan for reclamation to be conferred upon them. As the issue of benefits vel non to petitioner's lands under the federal questions was joined and tried, on the cause tried, the burden of proof was cast upon and assumed by respondent. Respondent's evidence, probably the only competent evidence on the issue, was the written plans themselves, including accompanying explanatory plats. The effect of the Court's decision was that respondent had not sustained the burden of proof, though the Court considered the issue itself not to be controlling. Beyond the effect of the state court's holding that the assessment and tax thereon are not supported by a benefit conferred, an independent examination of the plans (R. pp. 64-99) will exhibit that they contain no provision for benefiting petitioner's island within the legislative concept of benefit as expressed by the statute; that no plan for protecting the shore lands within respondent's corporate boundaries by a system of levees and incidental protection improvements could have been devised which, more

effectively, would have left petitioner's island and the slough between it and the shore lands more completely undisturbed in the same position and subject to the same extent to overflow, damage, cutting and even destruction by the floodwaters of the Missouri River than did both the plans adopted successively by respondent; and that any idea of benefit to the island entertained by the taxing agencies, necessarily, must have been based upon some vague concept or fanciful view of benefit and not on the facts or any legislative definition. Also, this Court will construe both the statute and the plans on the issue of benefits to determine the federal question of whether or not the statute, fair on its face and not subject to constitutional infirmity if fairly applied, has been so construed and applied in the particular case as to produce an unequal and unconstitutional result.

(b) The state court erred in its decision and judgment in the respect that it operates to impose a burden upon petitioner's lands as for benefits to accrue to the lands from the construction of a local improvement, which proposed local improvement does not include any provision for direct, tangible or substantial benefits to the lands, the circumstances and situation of petitioner's lands with respect to the improvement being such that any conclusion that the lands would be benefited by the improvement necessarily must have been based wholly upon speculation or some vague concept or fanciful view of benefit, and arbitrarily imposed.

(c) The sole evidence before the State Circuit Court on the question of benefits, and it probably was the only competent evidence, was respondent's original plan for reclamation, under which no improvement was made, and its amended plan for reclamation, under which the improvement was made. This Court will construe both the taxing statute and the plans, and determine for itself thereon the

federal question of whether or not the statute, fair on its face, has been so construed and applied by the state court in the particular case as to produce the unconstitutional result of a special benefit tax without corresponding benefit conferred or a tax arbitrarily imposed and unconscionably excessive.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court directed to the Supreme Court of Missouri, Division No. 1, directing the said court to certify and send to this court a transcript of the record and of the proceedings of the said Supreme Court of Missouri in the case numbered 37259, entitled on its docket Labaddie Bottoms River Protection District of Franklin County, a Corporation, (Plaintiff) Respondent, v. Lillian I. Randall, (Defendant) Appellant, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; that the judgment herein of the said Supreme Court of Missouri be reversed, and for such further relief as to this Court may seem proper.

Dated February 21, 1942.

LILLIAN I. RANDALL,
Petitioner,
By J. WESLEY McAFEE,
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LOUIS H. BREUER,
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St. Louis, Missouri,
Counsel for Petitioner.

BRIEF

In Support of Petition for Certiorari.

I.

The judgment of the Supreme Court of Missouri was rendered June 23, 1941. It became final November 26, 1941, when the Court en Banc made its order denying petitioner's petition or application to it for its order upon Division No. 1, for transfer of the cause to the Court en Banc, for decision. This petition is filed within three months thereafter.

II.

JURISDICTION.

The jurisdiction of this Court is conferred by Section 237-b of the Judicial Code, 28 U. S. C. 344-b.

III.

STATEMENT.

A statement of the case has been made in the foregoing petition for writ of certiorari under the heading "A Summary Statement of the Matter Involved," which, in the interest of brevity, is here adopted and made a part of this brief.

IV.

SPECIFICATIONS OF ERROR and Supporting Authorities.

1.

The state court erred in rendering its decision and judgment in its effect of levying a tax and imposing a lien for it upon petitioner's lands by judicial action and in adjudging enforcement of the lien so imposed; the subject matter of taxation being committed exclusively to the legislative branch of its government by the State Constitution; and the Court, functioning judicially, being possessed of no authority over, or jurisdiction of the subject matter of exercising the power of taxation directly or indirectly.

State ex rel. v. Swaggerty, 203 Mo. 517, 102 S. W. 483;
State ex rel. v. Locker, 266 Mo. 384;
Rhodes v. Bell, 230 Mo. 138, 130 S. W. 465;
16 C. J., pp. 393-394, Sec. 139;
Ball v. Rutland R. R. Co., 93 Fed. 513, 517;
Southern R. R. Co. v. Greene, 216 U. S. 400;
Yick Wo v. Hopkins and Wo Lee v. Hopkins, 118 U. S. 356, 357;
Westmore v. Karrick, 205 U. S. 141, 27 S. Ct. 434, 51 L. Ed. 745.

2-a.

The state court erred in giving to the decree of the Circuit Court, entered under Section 12509, R. S. Mo. 1939, in the respect that it included confirmation by the Court, functioning as an agency of the State Legislature, of the benefits assessed on respondent's plans for reclamation, the effect of operating as a final adjudication barring inquiry as to its own validity under the Federal Constitution; thereby holding and adjudging that, by its own

force, a completed act of the State Legislature bars judicial inquiry as to its validity or constitutionality.

W. J. McClanahan etc. Co. v. Stoffel, 41 Fed. (2nd) 651;
Rhodes v. Bell, 230 Mo. 138, 130 S. W. 465;
16 C. J., pp. 393-394, Sec. 139.

2-b.

The Court erred in the respect that by its decision and judgment it extends and expands by judicial action, the limited taxing authority delegated by the State Legislature, through Chapter 79, Article VI, particularly Section 12532, and grounds the judgment upon an exercise of the authority so extended and expanded.

Gantt v. Brown, 238 Mo. 560, 142 S. W. 422;
State ex rel. v. Locker, 266 Mo. 348, 181 S. W. 1001;
Birmingham Drainage District v. C. B. & Q. R. R., 274 Mo. 140, 202 S. W. 404;
Bushnell et al. v. Mississippi etc. Drainage Dist., 230 Mo. 921, 111 S. W. (2nd) 946, 952;
Kansas City So. Ry. Co. v. Road Impv. Dist., 256 U. S. 658;
State ex rel. v. Patterson, 229 Mo. 373, 129 S. W. 999;
City of Kansas v. Hannibal & St. J. R. Co., 81 Mo. 285-293;
Keane v. Strodtman, 323 Mo. 161, 163, 18 S. W. (2d) 896, 898;
District v. Township, 317 Mo. 933, 297 S. W. 1.

2-c.

The state court erred in the respect that, by its decision and judgment, it determined the effect of exercise of limited delegated taxing powers by respondent through proceedings under the statute (section 12532) of general application by construing respondent's intention, as to the effect, from language employed by respondent in the pro-

ceeding and without reference to the legislative intent expressed through the statute; and by applying the effect, so construed, against petitioner; particularly since the intention of respondent, so construed, probably conflicts with the legislative intent and the effect so construed probably would render the statute unconstitutional, were it also the legislative intent.

Gantt v. Brown, 238 Mo. 560, 142 S. W. 422;
State v. Field, 17 Mo. 529;
Exchange v. Knott, 212 Mo. 616, 111 S. W. 565;
State ex rel. v. Locker, 266 Mo. 384, 181 S. W. 1001;
In re Sizer, 300 Mo. 369, 254 S. W. 82;
O'Brien v. Trust Co., 319 Mo. 1001, 5 S. W. (2d) 74;
Ex parte Striker (C. C. Ky.), 109 Fed. 145, 150;
Arizona Commercial Mining Co. v. Iron Cap Copper Co., 236 Mass. 185, 128 N. E. 41;
Andrews v. Fidelity Mutual Life Ins. Co., 168 Mo. 151, 67 S. W. 582;
Southern R. R. Co. v. Greene, 216 U. S. 400, 39 S. Ct. 287, 55 L. Ed. 536, 17 Ann. Cases 1247;
Yick Wo v. Hopkins & Wo Lee v. Hopkins, 118 U. S. 356, 357.

2-d.

The state court erred in the respect that its decision and judgment, by its operative effect, revives and reinstates, on considerations of equity, respondent's original "plan for reclamation" and the old assessment of benefits on it, the improvement provided not having been undertaken and any rights under either of which having theretofore been abandoned and waived by respondent, and constitutes them, without proof, the basis for the tax levy and lien adjudged; and in the respect that the tax and lien, so adjudged, is applied on considerations of equities, not tried nor established, to secure funds to pay the cost of a different local improvement which was made under respondent's total "amended plan for reclamation," upon which amended plan and for which improvement an inde-

pendent total assessment of benefits had been made and confirmed, all under the statute.

Shepherd v. Barron, 194 U. S. 565, 24 S. Ct. 737, 48 L. Ed. 1115;
W. J. McClanahan etc. Co. v. Stoffel, 41 Fed. (2nd) 651;
Ballinger Oil Mill v. Southern Cotton Oil Co., 27 Fed. (2nd) 472;
Kansas City First Nat'l Bank v. White, 220 Mo. 717, 120 S. W. 36, 132 Am. S. R. 717, 16 Ann. Cases 889.

3-a.

The state court erred in failing and refusing to decide on their merits the federal questions involved.

State v. Humphries (Mo.), 119 S. W. (2nd) 401;
State v. Moore, 159 U. S. 675, 16 S. Ct. 179, 40 L. Ed. 301, affirming 121 Mo. 514, 26 S. W. 345; State ex rel. v. Robertson, 264 Mo. 661, 175 S. W. 610;
State ex rel. v. Trimble (Mo. Sup.), 18 S. W. (2d) 889;
Freeman on Judgments, Vol. II, Sec. 711, p. 1500.

3-b.

The state court erred in holding and adjudging that the fact that petitioner's precedessor in title was one of the signers of the petition on which respondent was incorporated effects an estoppel against judicial inquiry, at petitioner's instance, as to authority for or validity or constitutionality of the claimed effect of action taken, purportedly under the statute, and purportedly in exercise of the limited taxing power delegated through the statute.

O'Brien v. Wheelock, 184 U. S. 450;
State ex rel. St. Joseph Water Co. v. Eastin et al. (Mo. Sup. en Banc), 213 S. W. 57-59;

State ex rel. Blair v. Center Creek Mining Co., 262 Mo. 490, 501-502;
Boyd v. State of Alabama, 94 U. S. 645;
Freeman on Judgments, Vol. II, Sec. 711, p. 1500;
Shepherd v. Barron, 194 U. S. 565, 24 S. Ct. 737, 48 L. Ed. 1115.

4-a and b.

The Supreme Court of Missouri, both Division No. 1 and the Court en Banc, erred in refusing to transfer the cause to the Court en Banc, for decision; and erred in denying to petitioner the right given her by the State Constitution, Article VI, Amendment 1890, Section 4, to have the decision of the Court en Banc on the whole case. A decision by the Court en Banc is controlling over an opinion of division courts.

State v. Humphries (Mo.), 119 S. W. (2d) 401;
State v. Moore, 159 U. S. 675, 16 S. Ct. 179, 40 L. Ed. 301, affirming 121 Mo. 514, 26 S. W. 345.

5-a.

The state court erred in its decision and judgment in the respect that it sustains allowance by the State Circuit Court of an amendment, post trial and submission, of respondent's petition in a matter of substance and on statement of facts constitutive of its cause contradictory of the facts stated as constituting its cause on the petition on which issue was joined and tried; and in rendering judgment for respondent on the amended petition without issue joined or hearing or opportunity for either.

Belco v. State of Connecticut, 58 S. Ct. 149, 82 L. Ed. 288, affirming 122 Conn. 529, 191 Atl. 320, 113 A. L. R. 628;
Simon v. Craft, 182 U. S. 436, 21 S. Ct. 836, 45 L. Ed. 1165;

Railroad Commissioners of California v. Pac. Gas & Elec. Co., 302 U. S. 388, 58 S. Ct. 334, 82 L. Ed. 319;

And through a regular course of judicial proceedings, Ball v. Rutland R. Co. (C. C. Vt.), 93 Fed. 513-517.

The Fourteenth Amendment requires due process and equal protection in procedural as well as substantive law.

Ex parte Striker (C. C. Ky.), 109 Fed. 145, 150;

Arizona Commercial Mining Co. v. Iron Cap Copper Co., 236 Mass. 185, 128 N. E. 4;

Andrews v. Fidelity Mutual Life Ins. Co., 168 Mo. 151, 67 S. W. 582.

5-b.

The state court erred in rendering its decision and judgment in the respect that it affirmed the judgment of the State Circuit Court in allowing respondent to amend its petition, post trial and submission, the trial having resulted in a total failure of proof and in disproving, on the merits, the cause tried, so as to state and rely upon a different and contradictory substantive right purporting to cure the failure of proof, no element of waiver being present, and in rendering judgment on the petition as amended without issue joined, or hearing or opportunity for either.

Sidway v. Motor Co., 163 Mo. 342, 63 S. W. 705;

Creighton v. Railway Co., 229 Mo. 325, 66 S. W. (2nd) 980, certiorari denied 293 U. S. 558, 55 S. Ct. 70, 79 L. Ed. 659;

State ex rel. v. Webster Groves etc. District (Mo.), 37 S. W. (2nd) 905, 908;

Riggs v. Price, 277 Mo. 333, 210 S. W. 420;

Foege v. Woestendiek, 212 S. W. 411, 415;

Quigley v. King, 182 Mo. 196;
Scovill v. Glasner, 79 Mo. A. 449;
Purdy v. Pfaff, 104 Mo. A. 491, 78 S. W. 824;
City of St. Louis v. Wright Contracting Co., 210 Mo. 491, 109 S. W. 6.

6-a.

In determining the federal questions involved which present issues of denial of equal protection of law, which must be determined from comparison of state statutes of general application with the construction or application of them, or the rule of law adopted and applied and with the operative scope of the statute, in the particular case, this Court makes its own construction of the general statute or law and of the alleged special construction and application for purposes of the comparison.

Atchison etc. Ry. Co. v. Mathews, 174 U. S. 100, 19 S. Ct. 609, 43 L. Ed. 909;
Yick Wo v. Hopkins, 118 U. S. 366, 6 S. Ct. 1064, 30 L. Ed. 220;
Quaker City Cab Co. v. Commonwealth of Pennsylvania, 227 U. S. 389, 48 S. Ct. 553, 72 L. Ed. 927;
Louisville Gas & Elec. Co. v. Coleman, 277 U. S. 32, 48 S. Ct. 423, 72 L. Ed. 770.

6-b.

The state court erred in its decision and judgment in the respect that it adopted and applied against petitioner a special procedural law or construction of the State Code of general procedure; and in the respect that the special law or construction so applied specially, to petitioner, conflicts with the State Code and law of general application, including the State Constitution; and in the respect that the said special construction and application applied to

respondent adopts and applies a judicial procedure, which, inherently, is repugnant to the Fourteenth Amendment.

Sidway v. Motor Co., 163 Mo. 342, 63 S. W. 705;
Creighton v. Ry. Co., 229 Mo. App. 325, 66 S. W. (2d) 980 (cert. denied 293 U. S. 558, 55 S. Ct. 70, 79 L. ed. 659).

7.

The state court erred in its decision and judgment in the respects that it imposed directly and by affirmation of the judgment of the State Circuit Court, the burden of an assessment of benefits against petitioner's lands and a purported tax levy based thereon and purported lien therefor, all based upon a proposed local improvement which did not include any provision for corresponding benefits to petitioner's lands.

V.

ARGUMENT.

(Numbering employed corresponds to numbering of "Questions Presented" in the foregoing Petition for Writ of Certiorari.)

The amount of the single annual levy, a lien for which is enforced by the judgment of the state court, is not large. Standing alone it might not justify invoking this Court's jurisdiction to review the judgment. However, the judgment purports to and may constitute a final adjudication of the underlying basis of the lien, that is, the continued validity of the old assessment of benefits and the existence and validity of a total tax levy against it as a basis for annual levies. On that basis a number of other annual levies have been made, several of which are in suit and held in abeyance pending final disposition of this cause; a still further number of annual levies of installment tax will be levied in the future, and the assessment will be employed relatively perpetually as the basis for and measure of annual levies of maintenance tax by respondent. So that, in the total and in fact, petitioner seeks review of a judgment involving directly and consequentially imposition of a burden on her lands in a large amount and which well may become wholly confiscatory of the lands.

I.

The Judgment of the State Supreme Court Purports to Revive, or to Impose in the First Instance, a Special Benefit Tax and Lien for It Upon Petitioner's Lands; the Court Having No Authority or Jurisdiction of the Subject Matter of Taxation, Is Void by Force of the State Constitution and Probably Is Repugnant to Both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment.

We are considering here a question arising, in the first instance, on the judgment of the State Supreme Court. However, it is closely related to and presents a particular phase of the basis of questions numbered 2, 6 and 7.

The State Constitution, Article III, makes the usual and fundamental three-way distribution of the powers of government and expressly prohibits to each of the three branches exercise of any power belonging to either of the other two.

The legislative branch possesses exclusively the power of taxation. The courts, being the judicial branch, have no authority or jurisdiction of the subject matter of taxation. Hence a tax judicially imposed or dependent upon judicial action for its imposition is not a valid tax. When a court, or a judge thereof, performs any lawful function with respect to exercise of the State's power of taxation, it or he is not functioning as a court or judge, but as an agency of the State Legislature, and the result is not a judgment but a legislative act.

> Rhodes v. Bell, 230 Mo. 138, 130 S. W. 465;
> 16 C. J., pp. 393-394, Sec. 139.

Article III of the State Constitution prohibits the courts to assume exercise of the power. The legislative branch cannot surrender the power to the courts. The State

Legislature can neither add to nor take from the courts the powers given them by the State Constitution.

State ex rel. v. Locker, 266 Mo. 384.

A court cannot, in one breath, attempt to exercise the taxing power directly and judicially and in the same breath assume jurisdiction of the subject matter of enforcing the tax and a lien for it. The two powers exercised when assumed to be exercised in the same proceeding by a single judgment involve but a single subject matter—the state's power of taxation. Since the Court has no authority or jurisdiction of the subject matter of imposing the tax, it cannot validate the result of its assumption to exercise the prohibited authority through including in its judgment an act, prima facie, judicial. The entire judgment falls for lack of jurisdiction of the subject matter of taxation.

The judgment having been entered in contravention of a prohibition of the State Constitution, it cannot be said to have been entered according to the course of judicial proceedings. It denies due process of law.

Ball v. Rutland R. R. Co. (C. C. Vt.), 93 Fed. 513-517.

Through inquiry on a slightly varied approach, the conclusion must be that the judgment denies equal protection of the State's law in that the Constitution of the State is a part, the supreme part, of its law under an express constitutional prohibition over which the Court cannot exercise any lawful authority or jurisdiction. Judicial taxation also inherently would be special to the particular case, and, being prohibited by the State Constitution (Article IV, Sec. 53), it is unlawful; application of the same law, or the same application of the law, could not be made or be made lawfully, in any other instance as to any other person.

Equal protection of the law cannot flow from such a source.

> Southern R. R. Co. v. Greene, 216 U. S. 400, 39 S. Ct. 287, 55 L. Ed. 536, 17 Ann. Cases 1247;
> Yick Wo v. Hopkins and Wo Lee v. Hopkins, 118 U. S. 356, 357.

A judgment of a court rendered without jurisdiction of the subject matter denies due process of law within the prohibition of the Fourteenth Amendment.

> Westmore v. Karrick, 205 U. S. 141, 27 S. Ct. 434, 51 L. Ed. 745.

A law which on its face is unequal in that it does not apply to all persons in the same situation.

> Southern R. R. Co. v. Greene, 216 U. S. 400, 39 S. Ct. 287, 55 L. Ed. 536, 17 Ann. Cases 1247,

or a law of equal application on its face, but which intentionally is given a special construction and application so as to produce an unequal result in the particular case,

> Yick Wo v. Hopkins and Wo Lee v. Hopkins, 118 U. S. 356, 357,

denies equal protection of the law within the prohibition of the Fourteenth Amendment.

Viewed as dependent upon an assumption of and attempted exercise of the taxing power by the Court functioning judicially, the judgment of the State Supreme Court is void under circumstances which probably render it also repugnant to the due process and equal protection clauses of the Fourteenth Amendment. The federal question on that issue is one of substance since, if petitioner's position on it be sustained, and exclusive of every other question or consideration, a reversal of the judgment of the State court would result.

We will leave for further development in considering question numbered "6" the fact that the judgment was entered in the exercise by the Court of the taxing power.

II.

The Decision and Judgment of the State Supreme Court Expressly is Based Upon the Effect of Plenary Proceedings Had by Respondent Under Section 12532, Chapter 79, Article VII, R. S. Mo. 1939, Upon Prior Plenary Proceedings Had by It Under Sections 12502-12503 and 12505-12509, by Each of Which Proceedings Successively Respondent Had Adopted an Official and Total Plan for Reclamation on Each of Which Plans Successively Respondent Had Caused to Be Made and Approved a Total Assessment of Benefits and Under the Second in Time of Which the Planned Improvement Had Been Commenced and Completed. The Court Construed the Effect by Construing the Intention Thereto of Respondent From Items of Language Employed by Respondent in the Proceedings Had Under Section 12532, the Second Proceedings, and Without Reference to the Legislative Intent Expressed Through the Statute and Thereby Arrived at and Applied a Conclusion Contrary to That Stated by Respondent in its Petition on Which the Cause Was Tried, Contrary to the Legislative Intent Expressed Through the Statute, and Probably Inherently Repugnant to Both the State Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The question here considered also arises in the first instance on the decision of the State Supreme Court, though it is made controlling of that court's affirmance of the judgment of the State Circuit Court, and, therefore,

also, is involved directly in questions numbered "6" and "7."

Section 12532 is a taxing statute.

Prior to proceeding under section 12532 respondent had adopted under sections 12502 and 12503 an original "Plan for Reclamation" and had caused benefits to be assessed and confirmed on it under sections 12505 to 12509.

Respondent then desiring to amend or change its plan for its proposed local improvement, invoked the authority delegated by section 12532 and, proceeding in accordance with the section, adopted and secured to be approved by the Circuit Court an "Amended Plan for Reclamation" and caused to be assessed and confirmed benefits on it. The new plan was total and the new assessment on it was total. Neither was made supplementary of, referable to, or in any way dependent upon, the old. Total rights of way were condemned on the new plan. Thereafter the making of the improvement was commenced and completed under and in accordance with the amended plan. No improvement was made under the original plan.

If the new proceedings effected an abandonment of or superseded the old, then the judgment of the State Court is void since it enforces a lien for an assessment stated, but not tried, to be grounded exclusively on the old assessment to pay toward the cost of construction of the improvement made wholly under the new plan. We employ "abandonment" in a practical sense, under the particular circumstances, as expressing the idea of "becoming unavailable upon which to base claim of right or to accrue further rights."

Section 12532, so far as pertinent here, authorizes the levee district (respondent) to amend or change its plan for reclamation with approval of the Circuit Court and provides that, in case, benefits had been assessed on the

prior plan, then unless the Circuit Court in its decree approving the amendment or change of plan shall also find that the benefits will not be changed, benefits shall be assessed anew and all further proceedings had thereon as in the case of an assessment on an original plan. In the instant case in which the new plan adopted was total and the new assessment of benefits was total, the effect on the old plan and assessment is clear—the new has been substituted for the old and the old has ceased to have any operative effect. The legislative intent could not have been otherwise and have avoided the result of two total assessments for a single contemplated improvement, and the result of an assessment without reference to benefit that is an assessment of special benefits to accrue from one local improvement enforced to pay the cost of another. Those and other results of doubtful constitutionality would have flown naturally from the statute as written had it expressed a legislative intent to retain in effect the old assessment.

The state court construed the effect of the new proceedings to accomplish just that, plus that respondent might sue expressly to enforce a lien stated to have accrued wholly on either assessment and, failing in proof, have judgment without trial on a claim of lien stated to have accrued wholly on the other.

The criteria employed by the state court in construing the effect of the proceedings under section 12532 are of doubtful constitutionality, at least, equal to the court's conclusion upon them. The court construed the effect of the proceedings by construing the intention of respondent as to what the effect should be from items of language employed by respondent in the proceedings, and removed from their context, independently of and without consideration or reference to the legislative intent as expressed through the statute, and concluded that the new proceed-

ings did not effect an abandonment of or supersede the old because respondent had not intended them to work that result. The conclusion is directly contradictory of respondent's own statement in his petition on which trial was had, is in direct conflict with the legislative intent as expressed through the statute, and, as above pointed out, probably is inherently unconstitutional.

A statute means what the legislature intends it to mean as expressed through it.

Gantt v. Brown, 238 Mo. 560, 142 S. W. 422.

Statutes delegating exercise of taxing powers are construed strictly, since a liberal construction well might operate as a judicial delegation of legislative powers, or delegation of taxing power to the courts, an exercise of the power by the courts, or in unequal taxation, or as a delegation of legislative discretion as to what the law shall be.

State ex rel. v. Locker, 266 Mo. 384, 181 S. W. 1001.

If the effect of the proceeding under section 12532 can be made to depend upon the intention of the district proceeding under it in one case, it can be made so dependent in any case. The result would be a delegation to the district and the court construing its intention of a discretion to determine in each case the law for it, a special law in each case made by the district and the court.

The judgment of the state court is repugnant to both the due process and the equal protection clauses of the fourteenth amendment: It includes enactment by the court, functioning judicially, of a special taxing law applicable against petitioner only and in direct conflict with section 12532, the statute of general application, or makes a special construction and application of the statute against petitioner which is not and could not be applied against

another, and imposes, judicially, a tax and tax lien upon petitioner's lands unlawfully, without authority or jurisdiction of the subject matter of taxation, and, by judicial action, delegates the legislative discretion as to what the taxing law shall be, to the court itself in the particular case and exercises the power according to the intention of respondent and in a manner in conflict with the legislative intent expressed through the statute of general application in the circumstances.

III.

The Decision of the State Supreme Court in Its Effect That It Was Unnecessary to Consider on Their Merits the Federal Questions Involved, in View of Its Decisions That (1) Since Petitioner's Predecessor in Title Was One of the Signers of the Petition on Which Respondent Was Incorporated and Petitioner Thereby Is Estopped to Question the Constitutionality of Action Taken by Respondent in the Exercise of the Taxing Power Delegated to It, and (2) That the Legislative Action in Making the Assessment of Benefits Having Been Completed, It Operates to Bar Judicial Inquiry as to Its Own Constitutionality, Probably Is, as Also Is the Decision Basis for It, Repugnant to Both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment.

The question here presented also arises, in the first instance, on the decision of the State Supreme Court.

The petitioner's claim to benefit of guaranties of the federal constitution is not founded on any contention that respondent should not have been incorporated, or that it should not have executed the purposes for which it was incorporated.

The complaint, as directed to acts of respondent, is merely that respondent, as a corporation, proceeded in a

manner which, as against petitioner and her property, brought its corporate acts into conflict with the Federal Constitution.

The State Supreme Court's conclusion that one on whose petition a levee district is incorporated is estopped to deny the legality or constitutionality of the district's corporate acts would induce, with the same force, the conclusion that one who imposes any trust in another cannot be heard to complain of a breach by the trustee, since the complaining party has put it within the power of the trustee to commit the breach.

The special relation between the landowner petitioning for the incorporation of the district and the district when incorporated is correctly defined by this Court in

Shepherd v. Barron, 194 U. S. 565, 24 S. Ct. 737, 48 L. Ed. 1115,

to be that of parties to an implied contract with mutual contractual obligations and duties. The particularly relevant mutual aspect of the contractual relationship probably is that the district would not burden nor attempt to burden the particular landowner's property unlawfully, or in excess of the taxing authority delegated, or unequally, or except for corresponding benefit conferred, and that the landowner would not object to his lands becoming burdened within that undertaking. Reasoning from the premise of unilateral estoppel reasons, at least in the particular case, into unconscionable results in the name of conscience, produces conclusions inherently unconstitutional, such as that by operation of the applied estoppel on agency exercising taxing power by legislative delegation may exceed his authority and may with impunity disregard rights, as to the particular landowner, guaranteed to all citizens by the Constitution.

Under the contract relationship that couldn't result and

equal administration of the general taxing law would be retained. One may not contract away in advance his right to constitutional security.

W. J. McClanahan Sugar Refining & Molasses Co. v. Stoffel, 41 Fed. (2nd) 651;
Ballinger Oil Mill v. Southern Cotton Oil Co., 27 Fed. (2nd) 472;
Kansas City First Nat'l Bank v. White, 220 Mo. 717, 120 S. W. 36, 42, 132 Am. S. R. 612, 16 Ann. Cas. 889.

When respondent voluntarily proceeded under section 12532, it intended to effect the result of applying the intention of the Legislature to the proceedings.

The State Supreme Court's holding that the completed legislative act in making the assessment of benefits operates of its own force to bar judicial inquiry into its validity or constitutionality is a holding which, if accepted, would effectively render nugatory the Fourteenth Amendment. The amendment being directed against legislative action, benefit of it cannot be invoked in absence of legislative action upon which it can operate.

There can be no more direct action repugnant to the due process clause, particularly of the Fourteenth Amendment, than to deny the right to be heard on it, and an aggravated form of denial is to give to the legislative act charged to be repugnant the force of barring inquiry thereon.

IV.

The Refusals of the State Supreme Court, Both Division Court and Court in Banc, to Transfer the Cause to the Court in Banc, for Decision, Denied to Petitioner, Particularly, Benefit of a Regular Course of Judicial Review Accorded as of Right by the State Constitution (Article VI, Amendment 1890, Section 4).

The question considered here is also one arising in the first instance on the decision of the Supreme Court.

The Supreme Court en banc is the highest court in the State of Missouri having jurisdiction to decide a cause in which a federal question is involved. Article VI, Amendment 1890, Section 4, of the State Constitution, in terms plainly mandatory, provides that on application (not petition or motion) of the losing party, in a case decided in a division court the cause shall be transferred to the Court en banc when a federal question is involved for decision. We may concede that where the federal question is not substantial, or even where the decision on other grounds would prevail whatever might be the decision on the federal question, or even where the federal question was decided on its merits by the division court and the decision was right, there might be no substantial basis for complaint of prejudice by refusal to transfer the cause.

However, where the division court, as in this case, has refused to decide a federal question on the merits, and the question is a substantial one, a decision of which in accord with the losing party's contention on it would compel judgment for him whatever disposition might be made of other questions, then the refusal operates to deny him a hearing by the Court in banc to which hearing he has a constitutional right. The decisions of the Supreme Court en banc are of higher authority than are those of the division courts.

State v. Humphries (Mo.), 119 S. W. (2nd) 401.

The instant case presents the antithesis in principle of the record considered by this Court in

State v. Moore, 159 U. S. 675, 16 S. Ct. 179, 40 L. Ed. 301, affirming 121 Mo. 514, 26 S. W. 345,

in which the division court had decided the federal question on its merits and application to transfer the cause to the Court en banc had been denied. The decision by the division court was found to be right and the refusal of the transfer, therefore, not prejudicial.

It may be assumed that had this cause been transferred the full court would have made its decision to conform to the law and the Constitution of the United States, and have removed all occasion for recourse to this petition for writ of certiorari.

V.

The Decision of the State Court, in Its Effect That Respondent Having Stated in His Petition One Sequence of Constitutive Facts as His Cause of Action on Which Issue Was Joined and Trial Had, Resulting in Failure of Proof, Might After Trial Amend His Petition to State Another Sequence of Constitutive Facts as His Cause of Action and Have Judgment on the Latter Without Issue Joined or Trial, or Opportunity Afforded for Either, No Element of Waiver Being Present or Found, Since the Two Substantive Rights Claimed Were of the Same Character and Probably in the Same Amount, Constitutes a Denial of Due Process of Law by the Most Direct Possible Means.

The question considered here arises in the first instance on the judgment of the State Circuit Court and is carried into the judgment of the State Supreme Court. There is not much which could be added explanatory of the manner in which the question arises beyond the statement of the question itself.

If judgment lawfully might be entered on an amended petition under the circumstance, it just as lawfully might have been entered on the original petition at the time of filing and without issue joined or hearing.

The state court apparently has viewed the question of amending pleadings as one of substantive rather than of procedural law.

The allowance of amendments of pleadings has nothing to do with the truth or falsity of the statement of the pleading, nor with the existence or nonexistence of the right claimed, but deals only with the sufficience of statement of the supposed right.

The state court based its decision in this respect upon the State Civil Code. If the code authorized the patent departure from the cause tried to the cause adjudged, the code itself would be repugnant to the due process of law guaranteed by the Fourteenth Amendment. However, the decision is in conflict also with the State Code.

Under the State Code, the plaintiff's petition must make apparent the precise nature of the charge against the defendant.

> Sidway v. Motor Co., 163 Mo. 342, 63 S. W. 705.

And the pleader is bound conclusively by facts stated in his petition on which the cause is tried.

> Creighton v. Railway Co., 229 Mo. A. 325, 66 S. W. (2nd) 980, certiorari denied 293 U. S. 558, 55 S. Ct. 70, 79 L. Ed. 659.

And the pleader is estopped to and will not be heard to take a position inconsistent with his pleading on which a cause is tried.

> State ex rel. Boatmen's National Bank v. Webster Groves General Sewer District No. 1 (Mo.), 37 S. W. (2nd) 905, 908.

Judgments on issues not made on the pleadings on which the cause is tried are coram non judice and void.

Riggs v. Price, 277 Mo. 333, 210 S. W. 420;
Foege v. Woestendiek, 212 S. W. 411, 415.

Language must not be robbed of its plain and obvious meaning to unable its author to extricate himself from a position of embarassment.

Quigley v. King, 182 Mo. 196.

An amendment after trial can be made only to cure an immaterial variance, R. S. Mo. 1939, Section 731, and the proof required must not be essentially different.

Scovill v. Glasner, 79 Mo. A. 449.

The plaintiff may not amend back to an earlier abandoned petition.

Purdy v. Pfaff, 104 Mo. A. 331, 78 S. W. 824.

And the statute does not authorize an amendment by striking out an allegation relied upon as a basis of the action tried.

City of St. Louis v. Wright Contracting Co., 210 Mo. 491, 109 S. W. 6.

The holdings of the Missouri courts accord with the concept of due process of law, but none of them are applied in the particular decision of the state court.

VI.

The Post-Trial Amendment of Respondents' Petition, Approved by the Decision of the State Court, on the Particular Facts and Circumstances Denies Due Process of Law.

The question here considered applies the principles controlling of number V with the facts and circumstances controlling of number II.

VII.

The Judgment and Decision of the State Court Enforces a Lien for a Special Benefit Tax Without Corresponding Benefit or Arbitrarily Made in an Unreasonably Excessive Amount, and Which Is Discriminatory and Confiscatory and Denies Petitioner Equal Protection of the State's Law.

The question considered here is one of fact in law to be resolved from the face of the plans in evidence (R. pp. 63-98). The answer depends upon the location of petitioner's land with reference to respondent's proposed improvement, and the Missouri River, the character of the land as a river-made island and the character of the river itself. The situation in which the lands were and continued to be is illustrated graphically by the plat following R. p. 98 (Plaintiff's Exhibit A).

Petitioner's lands are identified thereon as tracts "89, 90, 91, 92 and 93," and in the name of "The Point Prairie Hunting and Fishing Club" (petitioner's predecessor in title), and as "Bull Island." It will be noted that petitioner's lands lie within respondent's corporate boundaries, that the surface elevation is approximately the same as that of the shore lands enclosed within the levee and about opposite the east or lower end of the island. It will

be noted that respondent's Missouri River levee is located a considerable distance to the south of them and on the old high bank of the Missouri River. It will be noted also that there lies between the said levee and the lands in suit a broad expanse of low slough lands (identified as "unknown owners"), separating the lands on Bull Island for its full length along its south side from the higher land to the south on which the levee is built. It will be noted also that the lands enclosed within respondent's levee slope from both the south side and the north side of respondent District toward the center of the enclosed lands, and slope also toward the east, so that the enclosed lands in the extreme east end of the District are much lower than the enclosed land on the shore directly opposite Bull Island. As to the condition which must have existed, prior to the construction of the works provided for, the "plan for reclamation" does not provide for any change whatever for respondent's lands on Bull Island, but leaves them wholly exposed to flood waters from the Missouri River to the same extent as they then were. It will be noted that no drainage from the bluff lands to the south of the District could have affected the lands on Bull Island, since they would have had to cross the lower part of the shore lands in the middle of the District and there would have been caught and carried to the east below Bull Island; and if the waters could have surmounted that unsurmountable obstacle, they would still would have had to cross the slough between respondent's Missouri River levee and petitioner's Bull Island, and then have climbed onto Bull Island in order to affect it. It will be noted that "retards 1-8" provided for in the "amended plan" are far up the river from Bull Island and intended to protect the river bank there from wash and erosion. If the "retards" could have any effect on Bull Island, it would be to direct the river's flow, by straightening it, more

directly against the north shore of Bull Island and cause probable increased wash and erosion there. It will be noted that no provision whatever was made for the protection of Bull Island on its Missouri River side against bank wash or erosion. In short, under the provisions of the plan, petitioner's lands on Bull Island were left in exactly the same position as existed at the time the District was incorporated, except that they might be subjected to some additional burden of flood waters of Missouri River by its being confined in narrowed limits and be made to serve as part of a "floodway" for the security of plaintiff's Missouri River levee and the lands enclosed by it.

This Court and the several courts of appeals have established through a large number of decisions some prominent criteria by which it is to be determined whether or not a special tax for a local improvement in a particular case is repugnant to the equal protection or due process clauses of the fourteenth amendment:

Inquiry is not foreclosed by the state of the local law, but a law fair on its face may be so construed and applied by the state in any particular case as to produce an unconstitutional result.

> Myles Salt Co. v. Iberia Drainage District, 239 U. S. 479;
> Nashville, Chattanooga & St. L. R. R. v. Walters, 294 U. S. 405-415;
> Yick Wo v. Hopkins, and Wo Lee v. Hopkins, 118 U. S. 356-373;
> Virginia Coupon Cases, 114 U. S. 269 et seq.

The whole theory of local assessment is compensation by corresponding benefit:

> McCormack v. Patchin, 53 Mo. 33, 36, 14 Am. 440;
> 44 C. J., p. 481, Sec. 2806;
> 44 C. J., p. 483, Sec. 2808;

Williams v. Hillman (Okla.), 145 Pac. 1111, 1116;
Pomeroy v. Public Water Works Co., 55 Colo. 476-483;
Owensboro v. Sweeney, 129 Ky. 607, 111 S. W. 364, 130 A. St. Rep. 477, 18 L. R. A. 181;
36 C. J., p. 1021, Sec. 66;
Halifax Drainage Dist. v. State (Fla.), 185 So. 123, 130.

The benefit must equal the assessment substantially:

White v. Tacoma (C. C. Wash.), 109 Fed. 32-33.

It is substantial and not uncertain speculative benefits which are required:

Marshall v. Commrs. of Upper Cache Drainage Dist., 144 N. E. 321, 323.

A special tax must not be levied disproportionately:

Houck v. Little River Drainage Dist. (Mo.), 239 U. S. 254;
Gast Realty & Inv. Co. v. Schneider Granite Co., 340 U. S. 55, 58-59, 36 S. Ct. 400, 60 L. Ed. 523.

The assessment must not be levied primarily for the benefit of surrounding lands. Such an assessment is confiscatory:

Myles Salt Co. v. Iberia Drainage Dist., 239 U. S. 479;
Schaforth v. Buena Vista Co. (Iowa), 165 N. W. 341, 342;
Ogden Levee Dist. v. K. C. Sou. Ry. Co. (C. C. A. 8 C.), 39 Fed. (2d) .....

The benefits must be special and beyond and in excess of those accruing to the general public from the improvement:

Cleveland, C. & St. Ry. Co. v. Munford (Ind.), 197 N. E. 826, 833;
Schaforth v. Buena Vista Co. (Iowa), 165 N. W. 341, 342.

Some indirect benefit based on vague speculation or surmise is not enough.

Thomas v. Kansas City Sou. Ry. Co., 261 U. S. 481, 484.

Remote and intangible benefits are not sufficient.

Chi. & N. W. Ry. Co. v. Board of Supervisors (Iowa), 165 N. W. 390, 391.

The benefits must not be based upon conjecture or speculation, or on the basis of equality with property which clearly is benefited.

Board of Directors of Miller Levee Dist. v. Prairie Pipe Line Co. (C. C. A. 8 C.), 292 Fed. 474;
Duncan v. St. John Levee & Drainage Dist. (C. C. A. 8 C.), 69 Fed. (2d) 342-345.

The classification of property, or the basis of assessment, must be such as will tend to produce equality of result.

Norwood v. Baker, 172 U. S. 269, 279, 19 S. Ct. 187, 43 L. Ed. 523.

The assessment must be made strictly within the provisions of the statute authorizing it, and the legislative

agency has no power to tax in any manner, except as conferred by the statute.

Birmingham Drainage Dist. v. C. B. & Q. R. R. Co., 274 Mo. 140, 202 S. W. 404;

St. Louis v. Wenneker, 145 Mo. 230, 239, 249 (en banc);

Bushnell et al. v. Mississippi & Fox River Drainage Dist. et al., 233 Mo. A. 921, 111 S. W. (2d) 946, 952;

Kansas City Southern Ry. Co. v. Road Improvement Dist., 256 U. S., l. c. 661.

Respectfully submitted,

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APPENDIX

of

Sections of State Constitution and Statutes Involved.

(Emphasis are petitioner's, employed to facilitate reference to particular clauses deemed pertinent.)

CONSTITUTION OF MISSOURI, ARTICLE III.

The Distribution of Powers.

Three departments of government.—The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confined to a separate magistracy, and **no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others,** except in the instances in this Constitution expressly directed or permitted.

Article II, **Sec. 30. Due process of law.**—That no person shall be deprived of life, liberty or property without **due process of law.**

Article II, **Sec. 20. Private property not to be taken for private use—exceptions—public use a judicial question.**—That **no private property can be taken for private use, with or without compensation, unless by the consent of the owner,** except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in such manner as may be prescribed by law, and that whenever an attempt is made to take private property for a use alleged to be public, **the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined,** without regard to any legislative assertion that the use is public.

Article IV, **Sec. 53. Special and local laws prohibited.—The General Assembly shall not pass any local or special laws.**

* * * (32) In all other cases **where a general law can be made applicable,** no local or special law shall be enacted.

Article VI, Amendments 1890, **Sec. 3.** (On Organization of State Supreme Court.) **Business divided, how—practice—opinions—original writs.**—The Supreme Court shall assign to each division the causes and matters to be heard by it, of which assignment due public notice shall be given, and all laws relating to practice in the Supreme Court, as well as the rules of the Supreme Court, shall apply to each division so far as they may be applicable thereto. **The opinion of each division shall be in writing, and shall be filed in the causes in which they shall be respectively made** during the term at which the cause is submitted, and **such opinions shall be a part of the records of the Supreme Court.** Each division shall have authority to issue the original writs and exercise the powers enumerated in section three of article six of the Constitution.

Sec. 4. Case transferred to court in banc, when.—When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or **when a federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision**; or when a division in which a cause is pending so shall order, the cause shall be transferred to the court for its decision.

Article VI, Amendment, 1884, Sec. 5, under which **the Supreme Court has exclusive appellate jurisdiction of cases involving constitutional or Federal questions.**

Revised Statutes of Missouri, 1939.

Chap. 79, "Drains, Levees and Water Supply Districts";

Art. 7, "Organization of Levee Districts by Circuit Courts";

Sec. 12532. Plan of drainage may be changed, how.—The board of supervisors for and in behalf of any levee district organized under the provisions of this article, or the owners of land adjacent to such district, **shall have the right to file a petition in the office of the clerk of the court, organizing the district praying the court** to amend its former decree incorporating the district, by correcting the names of landowners, by striking out any such names, by adding, striking out or correcting the descriptions of any lands within or alleged to be within the boundary lines of any such district, or in any other manner amend its decree; **said petition may ask permission of the court for said board to amend or change "the plan for reclamation",** or to correct any errors, omissions or other mistakes that have been discovered in "the plan for reclamation", or said petition may ask that the boundary lines of said district be extended so as to include lands not described by and included in the articles of association filed and the decree of the court incorporating the district. **If such petition asks the court permission to "change the plan for reclamation"** or that the boundary lines of such district be in any manner changed, **it shall also ask the court to appoint three commissioners as provided under the provisions of section 12505 to appraise the land that shall be taken for rights-of-way or other works, or assess the benefits and damages to any or all lands, railroad and other property** already in the district or that may be annexed to the district by the proposed amendments, and changes to "the plan for reclamation" or the proposed change in the boundary lines of said district. After said petition shall have been filed, the court

wherein said petition is filed, if in session, or the clerk thereof in vacation, shall fix the date not less than 45 nor exceeding 60 days from the date of filing said petition, on or before which objections, if any, shall be filed to said petition, and the clerk shall give notice of the filing of said petition and of the date on or before which objections, if any, to said petition shall be filed by causing publication to be made once a week for four consecutive weeks in some newspaper published in each county in which are situate the land and other property affected by the proposed changes, amendments and corrections mentioned in said petition, the first insertion to be made not more than fourteen days after the date on which the petition was filed. Said notice shall be substantially in the following form and it shall be deemed sufficient for all purposes of this article:

(Here follows form of notice.)

Where lands or other property in different counties will be affected by the proposed changes, amendments and corrections enumerated in the said petition, it shall not be necessary to include all the said lands or other property in the notice published in the different counties, but only such of said lands and other property as are situated in the respective counties. Any owner of land or other property that will be affected by the proposed changes, amendments and corrections mentioned in the petition, may on or before the date fixed and published as above provided, file objections in the court or if in vacation thereof, in the office of the clerk of such court wherein the said petition is filed, to the granting of the prayer of the said petition: **Provided,** that the court may in vacation or term time extend the time upon terms. **The court shall hear said petition and all objections that may have been filed against said petition in a summary manner without unnecessary delay, at either a regular, adjourned, special or called term, and enter its decree according to its findings.** The clerk of

said court shall, within fifteen days after the granting of such decree, transmit a certified copy of said decree and a copy of the petition to the secretary of the board of supervisors, who shall transmit a copy of the same to each of the recorders of deeds of the counties having land in the district and to the secretary of state. Each such recorder shall file and preserve the same in his office, and for such filing and preserving he shall receive a fee of one dollar. **If said decree of the court provides that "the plan for reclamation" may be amended, changed or corrected,** or the boundary lines of the district extended, **the court shall appoint three commissioners, possessing the same qualifications as the commissioners appointed under the provisions of section 12505 of this article, to appraise property to be taken, assess benefits and damages and estimate the cost of improvements the same as is required of commissioners acting under the provisions of section 12507 of this article. Said commissioners shall make their report in writing and file the same with the circuit clerk, after which the case shall be proceeded with in the same manner as is now provided for in the previous sections of this article for the organization of levee districts: Provided,** that if the petition be dismissed the district shall pay the cost, but if the petition be sustained in whole or in part, the objectors shall pay the court costs. **In case the benefits and damages have been assessed on the land and other property remaining in the district and the court finds the same will not be altered by** either the change in the boundary line or **change in "the plan for reclamation", the court shall not appoint commissioners to make assessments.**

Chap. 6, "Civil Procedure—General Code"; Art. 5, "Pleadings"; **Sec. 916. The petition is the first pleading—what it shall contain.**—The first pleading on the part of the plaintiff is the petition, which shall contain: First, the title of the cause, specifying the term, the name of the court

and county in which the action is brought, and the names of the parties to the action, plaintiffs and defendants; second, **a plain and concise statement of the facts constituting a cause of action**, without unnecessary repetition; third, **a demand of the relief to which the plaintiff may suppose himself entitled.** If the recovery of money be demanded, the amount thereof shall be stated, or such facts as will enable the defendant and the court to ascertain the amount demanded.

Sec. 920. The defendant may answer or demur.—The only pleading on the part of the defendant is either a **demurrer** or an **answer.**

Art. 6, "Amendment of Pleadings and Sundry Proceedings." **Sec. 969. Variance, when deemed material.**—No variance between the allegation in the pleading and the proof shall be deemed material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits; when it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, by affidavit showing in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just.

Art. 16, "New Trials, Arrest of Judgment and Bills of Exceptions. **Sec. 1167. Failure of proof—verdict—when set aside.—Where the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, but a failure of proof.** In case of such failure of proof, and a verdict of a jury or finding of the court against the party so failing, and the court is satisfied, from the proof given, that the party has a good cause of action or defense, the court may on motion of such party, set aside the verdict

or finding, and grant a new trial, and permit the pleadings to be amended on such terms as may be just.

Art. 6, "Amendment of Pleadings and Sundry Proceedings." **Sec. 970. Variance not material, proceedings.—When the variance** between the allegation in the pleading and the proof **is not material, the court may direct the facts to be found according to the evidence,** or may order an immediate amendment without costs.

Sec. 971. Amendment before final judgment.—The court may, at any time before final judgment, in furtherance of justice, and on such terms as may be proper, **amend any** record, **pleading,** process, entry, return or other proceedings, **by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim** or defense, **by conforming the pleading or proceeding to the facts proved.**

Sec. 982. Amended pleadings may be answered.—If any amendment be made to any pleading, the adverse party shall be allowed an opportunity, according to the course and practice of the court, to answer or reply to the pleading so amended.

Sec. 987. This article to extend to what actions.—The provisions of this article shall extend to all actions, including all suits for the recovery of any debt due to this state, or for any debt, duty or revenue belonging to this state, and also to all actions for penalties, to all writs of *mandamus* and prohibition, to informations in the nature of a *quo warranto*, to writs of *scire facias* and to the proceedings thereon, but shall not extend to indictments or informations for any criminal matter, or to the proceedings thereon.

Sec. 988. Duty of court in construing this law.—It shall be the duty of the courts to so construe the provisions of law relating to pleading, and to so adapt the practice thereunder as to discourage, as far as possible, negligence and **deceit,** to prevent delay, **to secure parties from being misled, to place the party not in fault as nearly as possible in the same condition he would be in if no mistake had been made, to distinguish between form and substance, and to afford known, fixed and certain requisites in place of the discretion of the court or judge thereof.**

Revised Statutes Missouri, 1939, Chapter 79, "Drains, Levees and Water Supply Districts," Article VII, "Organization of Levee Districts by Circuit Courts" (Sections 12492-12547).

Sec. 12492 (10902). Levee districts, how organized.—The owners of a majority of the acreage in any contiguous body of swamp, wet or overflowed land or other property in the nature of individual or corporate franchises in this state, **or land subject to overflow, wash or bank erosion,** situate in one or more counties in this state **may form a levee district for the purpose of having such land and other property reclaimed and protected from the effects of overflow and other water,** for sanitary or agricultural purposes, **or from the effect of wash or bank erosion,** or when the same may be conducive to the public health, convenience or welfare, or of public utility or benefit, **by levee, or otherwise, and for that purpose they may make and sign articles of association** in which shall be stated: The name of the district, and the number of years the same is to continue; the boundary lines of the proposed levee district; the names of the owners of land or other individual or corporate franchise property in said district, together with a description of the land and other such property owned by each; when the name of the owner of any of said lands or other prop-

erty is unknown, this fact shall be set out in said articles; said articles shall further state that the owners of real estate and other such property within said district whose names are subscribed to said articles are willing to and do obligate themselves to pay the tax or taxes which may be assessed against their respective lands or other property to pay the expense of organizing, and of making and maintaining the improvements that may be necessary to effect the reclamation or protection of said lands or other such property, so formed into a levee district, and to reclaim and to protect the same from the effects of overflow and other water, or from bank erosion or wash, and **said articles of association shall contain a petition praying that the lands and other property described therein be declared a levee district under the provisions of this law.** After said articles of association and petition have been so signed the same shall be filed in the office of the circuit clerk of the county in which such lands and other property are situate; or, if such lands and other property be composed of tracts or parcels situate in two or more different counties then in the office of the clerk of the circuit court of the county in which there are situate more of said lands and other property than in any other county; **Provided,** that in the event any work is to be done upon any navigable stream, the consent of the federal government shall be obtained to make such improvement or improvements before the actual work on the improvement shall be begun.

Sec. 12493 (10903). Defining and construing terms and provisions of this article.

Sec. 12494 (10904). Circuit clerk shall give notice by publication of application to form drainage district—form of notice.

Sec. 12495 (10905). Objections—procedure.—Any owner of real estate or other property as herein described, in said

proposed district, who may not have signed said articles of association, objecting to the organization and incorporation of said levee district may, within forty-five days after the date on which said articles of association and petition were filed, file his objection or objections why such levee district should not be organized and incorporated. Such objection or objections shall be limited to a denial of the statements in the articles of association, and shall be heard by the court in a summary manner, without unnecessary delay, **and in case all such objections are overruled, the circuit court shall, by its order duly entered of record, duly declare and decree said levee district a public corporation of this state,** for a term not exceeding the time mentioned in said articles of association signed and filed. If the court finds that the lands set out in said articles of association should not be incorporated into a levee district, it shall dismiss said proceedings and adjudge the costs against the signers of said articles of association in proportion to the acreage represented by each. Any person having signed the articles of association shall have no right to have said proceedings dismissed as to him without the written consent of the majority in acreage of the owners who signed said articles. The articles of association and petition may be amended as any other pleading. Within sixty days after the said district has been declared a corporation by the court, the clerk shall thereafter transmit to the secretary of state a certified copy of the findings and decree of the court incorporating said district, and the same shall be filed in the office of the secretary of state in the same manner as articles of incorporation are now required to be filed under the general law concerning corporations. A copy of said findings and decree, together with a plat of the district, shall also be filed in the office of the county recorder in each of the counties having land in said district, where the same shall become a permanent record,

and each such recorder shall receive a fee of one dollar ($1.00) for filing and preserving the same.

Sec. 12496 (10906). Board of supervisors—how elected—term of office—* * * "at such election each and every acre of land and each and every mile of right of way of every corporation owning a franchise in the district **shall represent one share" and be entitled to one vote for each share.**

Sec. 12497 (10907). Board of supervisors—vacancy declared, when—vacancy filed, how.

Sec. 12498 (10908). Article, how construed—existing rights not to be affected by this article.

Sec. 12499 (10909). Annual election—who entitled to vote. * * * Provided, that **after the report of the commissioner has been confirmed by the court under the provisions of section 12509 only the land and other such property having benefits assessed against it shall be entitled to vote** at the annual meetings held under the provisions of this section.

Sec. 12500 (10910). Supervisors to take oath.

Sec. 12501 (10911). Organization of board—to make annual report—compensation.

Sec. 12502 (10912). Board to appoint chief engineer and assistants—their duties.—Within sixty days after organizing the board of supervisors shall appoint a competent civil engineer as chief engineer, who may be an individual, copartnership or corporation, and who shall engage such assistants as the board of supervisors may approve. The chief engineer shall have control of the engineering work in said district. The chief engineer may, by and with the consent of the board of supervisors, consult any eminent engineer or engineers and obtain his or their opinion and advice concerning the reclamation or protection of land in said district. **The said engineer or engineers shall make all**

necessary surveys of the lands within the boundary lines of said district, as described by the articles of association, and of all lands adjacent thereto that may or will be improved or reclaimed in part or in whole by any system of levees or bank protection that may be outlined and adopted, and said engineer or engineers shall make a report in writing to the board of supervisors with maps and profiles of said surveys, which report shall contain a plan for leveeing, draining, reclaiming or protecting the lands and property described in the articles of association or adjacent thereto from overflow of or damage by water.

Sec. 12503 (10913). Chief engineer to make report—when—plan for reclamation, how adopted.—The chief engineer shall make a report in writing to the board of supervisors when said board shall so require it. Upon receipt of the final report of said engineer concerning surveys made of the lands and other property contained in the district organized, and plans for reclaiming or protecting the same the board of supervisors shall adopt such report or any modification thereof approved by the chief engineer after consulting with him or some one representing him, and thereafter such adopted report shall be the plan for leveeing, protecting or reclaiming such lands and other property from overflow or damage by water, and it shall after such adoption be known and designated as "the plan for reclamation," which term shall include leveeing, diking, bank protection, current control or other improvement, which plan shall be filed with the secretary of the board of supervisors and by him copied into the records of the district.

Sec. 12504 (10914). Levy of tax to pay cost of organization—when payable—how used.

Sec. 12505 (10915). Secretary of board to file copy of plan with circuit clerk—duty of board—commissioners, how

appointed.—Within twenty days after the adoption of "the plan for reclamation" the secretary of the board of supervisors shall prepare and transmit a certified copy thereof to the circuit clerk of the court organizing said levee district, and at the same time **the board of supervisors shall file with said circuit clerk a petition asking the judge of said court to appoint commissioners to appraise the lands within and without said district to be acquired for rights of way, holding basins and other works of the district and to assess benefits and damages accruing to all lands in the district and other property by reason of the execution of "the plan for reclamation".** Within thirty days after the filing of such petition the judge of said court, either in term time or vacation, shall, by an order, appoint three commissioners, who shall be freeholders residing within the state of Missouri, and who shall not be landowners in said district nor of kin within the fourth degree of consanguinity to any person owning land in said district. A majority of said commissioners shall constitute a quorum and shall control the action of the board on all questions.

Sec. 12506 (10916). Organization of board of commissioners.—Said circuit clerk upon the filing of said order of appointment shall notify each of said commissioners of his appointment by written or printed notice, and in the same notice he shall state the time and place for the first meeting of said commissioners. **The secretary of the board of supervisors or his deputy shall attend such meeting, and shall furnish to said commissioners a complete list of lands, all corporate and other property described in the articles of association or adjacent thereto that will be affected by carrying out and putting into force "the plan for reclamation"**, and the names of the owners of such property, as were contained in the articles of association, at the date of the final decree of the court incorporating the district. Said secretary shall also furnish said commissioners a

copy of "the plan for reclamation" mith maps and profiles in his office. The commissioners at said meeting, or within ten days thereafter, shall each take and subscribe to an oath that they will faithfully and impartially discharge their duties as such commissioners and make a true report of the work done by them. The said commissioners shall also at said meeting elect one of their own number chairman, and the secretary of the board of supervisors, or his deputy, shall be ex officio secretary of said board of commissioners during their continuance in office.

Sec. 12507 (10917). Commissioners to inspect districts and assess benefits and damages—to file report.—Within thirty days after qualifying, as provided for in the previous section, the commissioners shall begin their duties; they may at any time call upon the attorney of the district for legal advice and information relative to their duties, and **the chief engineer or one of his assistants shall accompany said commissioners at all times and shall render his opinion in writing when called for. Said commissioners** shall proceed to view the premises and **determine the value of all land and other property, within or without the district, to be acquired and used for rights-of-way, or other works set out in "the plan for reclamation"; they shall assess the amount of benefits, and the amount of damages, if any, that will accrue to each governmental lot, forty acre tract or other subdivision of land** according to ownership, railroad and other rights of way, railroad roadways and other property **from carrying out and putting into effect "the plan for reclamation" heretofore adopted.** The commissioners **in assessing the benefits to lands,** public highways, railroad and other rights of way, railroad roadways and other property not traversed by such works and improvements as provided for in "the plan for reclamation", **shall not consider what benefits will be derived by such property after other levees, ditches, improvements or**

other plans for reclamation shall have been constructed, but they shall assess only such benefits as will be derived from the construction of the works and improvements set out in "the plan for reclamation", or as the same may afford protection from overflow of such property. The commissioners shall give due consideration and credit to any other levee, ditch or other systems of reclamations which may have already been constructed and which afford partial or complete protection to any tract or parcel of land in the new district, and if the commissioners shall find that any levee or other works have been constructed under any general or special law of this state, which can be used in making the levees and improvements herein contemplated, they shall include the same in their report, and thereafter the said board of supervisors may order such levees or such works to be used, so far as they extend, for the purpose of the levee district in which they are situated, and that the district or other owners of such levee or other improvements or persons having an interest in same by virtue of having contributed money, material or labor in the construction of the same, shall be allowed in proportion to the interest held or owned in said levees or improvements, a compensation which shall not exceed the amount of such levee district's indebtedness as evidenced by outstanding scrip, bonds or other evidences of indebtedness. The railroad and other rights of way, railroad and other property shall be assessed according to the increased physical efficiency and decreased maintenance cost by reason of the protection to be derived from the proposed works and improvements. **The commissioners shall have no power to change "the plan for reclamation" heretofore provided for. The board of commissioners shall prepare a report of their findings, which shall be arranged in tabular form,** the columns of which shall be headed as follows: Column one, "owner of property assessed"; column

two, "description of property assessed"; column three, "number of acres assessed"; column four, "amount of benefits assessed"; column five, "number acres taken for right of way"; column six, "value of property taken"; column seven, "damages". **They shall also, by and with the advice of the engineer of the district, estimate the cost of works set out in "the plan for reclamation"**, which estimate shall include the cost of property required for rights of way and damages and the actual expenses of organization and administration, as estimated by the board of supervisors, and shall itemize and tabulate the same. Said report shall be signed by at least a majority of the commissioners and filed in the office of the circuit clerk, in which the articles of association were filed. **The secretary of the board of supervisors, or his deputy, shall accompany said commissioners while engaged in their duties, and shall perform all clerical work of said board; he shall also under the advice, supervision and direction of the attorney for the district, prepare their report.** Said board of commissioners shall report to the board of supervisors the number of days each had been employed and the actual expenses incurred. Each commissioner shall be paid five dollars per day for his services, and necessary expenses in addition thereto.

Sec. 12508 (10918). Property owners to be notified of commissioners' report by publication—publication, how made.

Sec. 12509 (10919). Exceptions, how heard and determined.—The levee district or **any owner of land or other property in said district, may file exceptions to said report or to any assessment for either benefits or damages,** within ten days after the last day of publication of the notice provided for in the preceding section. **All exceptions shall be heard by the court and determined in a summary manner** so as to carry out liberally the purposes and needs of

the district, and **if it appears to have the satisfaction of the court,** after having heard and determined all of said exceptions, **that the estimated cost of constructing the improvement contemplated in "the plan for reclamation", is less than the benefits assessed against the land and other property in said district, then the court shall approve and confirm said commissioners' report as so modified and amended.** The court shall adjudge and apportion the costs incurred by the exceptions filed **and shall condemn any land or other property,** within or without the boundary lines of the district, **that is shown by the report of the commissioners to be needed for rights-of-way, holding basins and other works, or that may be needed for material** to be used in constructing said works, following, as nearly as possible the procedure that is now provided for by law for the appropriation of land and other property taken for telegraph, telephone and railroad rights-of-way. **The clerk of said circuit court shall transmit a certified copy of the court decree and copy of the commissioners' report, as confirmed or amended by the court, to the secretary of the board of supervisors of the district, who shall make and transmit a certified copy of the said decree and that part of the said report affecting land in each county to the recorder of each county having lands in the district, or affected by the said report, where the same shall become a permanent record** and each such recorder shall receive a fee of one dollar ($1.00) for receiving, filing and preserving the same. **Any person may appeal from the judgment of the court, and upon such appeal there may be determined either or both of the following questions: First, whether just compensation has been allowed for property appropriated; and, second, whether proper damages have been allowed for property prejudicially affected by the improvements.**

Sec. 12510 (10920). Board of supervisors to construct

works and improvements—contracts, how let—duties of chief engineer.

Sec. 12511 (10921). Board of supervisors to levy tax—duties of secretary of board:—After the lists of land and other property, with the assessed benefits and the decree and judgment of court, have been filed in the office of the county recorder as provided in section 12509 of this article, then the board of supervisors shall without any unnecessary delay, levy a tax of such portion of said benefits on all lands, railroad and other property in the district to which benefits have been assessed, as may be found necessary by the board of supervisors to pay the cost of the completion of the proposed works and improvements as shown in said "plan for reclamation", and in carrying out the objects of said district, and plus ten per cent of said total amount for emergencies. The said tax shall be apportioned to and levied on each tract of land or other property in said district in proportion to the benefits assessed and not in excess thereof, and in case bonds are issued as provided herein and hereafter, then the amount of the interest (as estimated by said board of supervisors) which will accrue on such bonds shall be included and added to the said tax, but the interest to accrue on account of the issuing of said bonds shall not be construed as a part of the costs of construction in determining whether or not the expenses and costs of making said improvements are or are not equal to or in excess of the benefits assessed. The secretary of the board of supervisors, as soon as said total tax is levied, shall, at the expense of the district, prepare a list of all taxes levied, in the form of a well-bound book, which book shall be indorsed and named "levee tax record of ..... levee district .....", which indorsement shall also be printed or written at the top of each page in said book, and shall be signed and certified by the president and secretary of the board of supervisors, attested by the seal of

the district, and the same shall thereafter become a permanent record in the office of said secretary.

Sec. 12512 (10922). Board of supervisors to levy annual installment tax—form of certificate of tax.—The said board of supervisors shall each year thereafter determine, order and levy the amount of the annual installment of the total taxes levied under the preceding section, which shall become due and be collected during said year at the same time that state and county taxes are due and collected, **which said annual installment and levy shall be evidenced and certified by the said board** not later than September 1st of each year **to the collector of revenue of each county** in which lands and other property of said district are situate. The certificate of said installment tax shall be in substantially the following form:

(Here form is set out.)

Then shall follow a table of schedules showing in properly ruled columns, first, the names of the owners of said lands and other property as they appeared in the decree of the circuit court organizing said district; second, the descriptions of the said lands and other property opposite the names of said owners; third, the amount of said annual installment tax levied on each tract of land or piece of property; fourth, the amount of maintenance tax; fifth, a blank column in which the collector shall record the several amounts as collected by him; sixth, a blank column in which the collector shall record the date of payment of the different sums; seventh, a blank column in which the collector shall record the names of the person or persons paying the several amounts. The columns in which the annual installment tax and the maintenance tax, if any, appear shall be correctly totaled and the total amount shall correspond to the amount set out in the above mentioned certificate. **The said certificate and table shall be prepared in**

the form of a well-bound book which shall be indorsed and named "levee tax book ..... levee district ..... county, Missouri, for the year 19...", which indorsement shall also be printed at the top of each page in said book.

Sec. 12513 (10923). Collector of revenue to collect levee tax—to give bond to board of supervisors.

Sec. 12514 (10924). Levee tax delinquent, when—penalty.

Sec. 12515 (10925). Penalty for failure of collector to pay over tax.

Sec. 12516 (10926). Levee tax to constitute a lien—how evidenced.—All levee taxes provided for in this article, together with all penalties for default in payment of the same, all costs in collecting the same, including a reasonable attorney's fee, to be fixed by the court and taxed as costs in the action brought to enforce payment, **shall, from date of filing the certificate hereinafter described in the office of the recorder of deeds for the county wherein the lands and properties are situate, until paid, constitute a lien, to which only the lien of the state for general state, county, school and road taxes shall be paramount, upon all the lands and other property against which such taxes shall be levied as is provided in this article. Such lien shall be evidenced by a certificate substantially in the following form,** to-wit:

(Here form is set out.)

The certificates and table specified in this section shall be prepared in a well-bound book and filed in the office of each of the recorders of the counties having lands in said districts as the same may affect the land or other property in his county, where the same shall become a permanent record of the office. The said book or books shall be prepared by the secretary of the board of supervisors at the expense

of the levee district, **shall be designated as the "levee tax record"**, and each recorder shall receive a fee of one dollar ($1.00) for filing said book and preserving the same.

Sec. 12517 (10927). Tax book to be prima facie evidence—suits for taxes, how brought.—The "levee tax book" of the district, as returned by the collector of the revenue to the secretary of the board of supervisors of the levee district shall be prima facie evidence in all courts of all matters therein contained. **The liens established and declared in the preceding sections may and shall be enforced by an action on delinquent tax bills, made and certified by the county collector, which action shall be instituted in the circuit court without regard to the amount of the claim within six months after December 31st of the year for which said taxes were levied. The suits shall be brought in the corporate name of the district by its attorney against the land or lands, property or properties, on which such levee tax has not been paid.** The suit shall be brought in the county in which the property is situate, except when the tract or property sued upon be in more than one county, in which event the suit may be brought on the whole tract, parcel or property in any county in which any portion thereof may be situate. **The pleadings, process, proceedings, practice and sales, in cases arising under this article shall, except as herein provided, be the same and have the same effect as in an action for an enforcement of the state's lien for the delinquent general taxes upon real estate,** and the aforesaid "levee tax book" shall have the same probative effect as the back tax bill has in actions for the enforcement of the state's lien for general taxes upon real estate. The title acquired through any sale of lands or other property under the aforesaid proceedings shall be subject to the lien of all subsequent annual installments of levee tax. In all suits for the collection of delinquent taxes, the judgment for said delinquent taxes and penalty shall

also include all costs of suit and a reasonable attorney's fee to be fixed by the court, recoverable the same as the delinquent tax and in the same suit. The proceeds of sales made under and by virtue of this article shall be paid at once to the aforesaid treasurer and shall be accounted for by him the same as the levee taxes.

Sec. 12518 (10928). Secretary of board to be ex officio treasurer—salary—duties of—board to audit books annually and publish financial statement.

Sec. 12519 (10929). Supervisors—powers and duties.—In order to effect the leveeing, protection and reclamation of the land and other property in the district subject to tax, the board of supervisors is authorized and empowered to straighten, widen, change the course and line of any levee in and out of said district; to fill up any creek, drain, channel, river, watercourse or natural stream; and to divert or divide the flow of water in or out of said district; to construct and maintain sewers, levees, dikes, dams, sluices, revetments, drainage ditches, pumping stations, syphons and any other works and improvements deemed necessary to preserve and maintain the works in or out of said district; to construct roadways over levees and embankments; to construct any and all of said works and improvements across, through or over any public highway, railroad right-of-way, track, grade, fill or cut in or out of said district; to remove any fence, building or other improvements in or out of said district, **and shall have the right to hold, control and acquire by donation or purchase, and if need be, condemn any land, easement, railroad or other right-of-way, sluice or franchise in or out of said district for right-of-way, or for any of the purposes herein provided, or for material to be used in constructing and maintaining said works and improvements for leveeing, protecting and reclaiming the lands in said district.** Said board shall also have the right to condemn for the use of the district, any

land or property within or without said district not acquired or condemned by the court on the report of the commissioners assessing benefits and damages and shall follow the procedure that is not provided by law for the appropriation of land or other property taken for telegraph, telephone and railroad rights of way.

Sec. 12520 (10930). Board of supervisors to employ attorney—duties.—The board of supervisors shall employ an attorney to act for the district and to advise said board. Such employment shall be evidenced by an agreement in writing, which, as far as possible, shall specify the exact amount to be paid to said attorney for all services and expenses. Such attorney shall conduct all legal proceedings and suit in court where the district is a party or interested, and shall in legal matters advise the said board of supervisors, all officers, employees or agents of said district and board, and generally look after and attend to all matters of a legal nature for said board and district. When the said board may deem it necessary, they may, by and with the advice of said attorney, and under the like terms and conditions as above set forth, employ another attorney or attorneys (R. S. 1929, Sec. 10930).

Sec. 12521 (10931). Board to keep record of proceedings—open to inspection. The board of supervisors of any district organized under this article shall cause to be kept a well-bound book, entitled "Record of board of supervisors of ..... district", in which shall be recorded minutes of all meetings, proceedings, certificates, bonds given by all employees and any and all corporate acts, which record or records shall at all times be open to the inspection of anyone interested, whether taxpayer or bondholder.

Sec. 12522 (10932). Damages assessed must be paid before appropriating land.

Sec. 12523 (10933). Embankments on right-of-way to be raised at expense of owner to conform to district levee.

Sec. 12524 (10934). Unpaid warrants to draw interest.

Sec. 12525 (10935). Bonds payable to district.

Sec. 12526 (10936). Change of venue.

Sec. 12527 (10937). Action not to abate by reason of death of party.

Sec. 12528 (10938). Appeals.—No appeal from any action of the circuit court had under this article shall be permitted to act as supersedeas or to delay any action of the prosecution of any proceedings or work begun under the provisions of this law. **Any procedure had under sections 12496, 12509, 12532, or 12543 of this article may be heard and determined by the court at either regular, adjourned or special sessions.**

Sec. 12529 (10939). Court to declare corporation dissolved, when.

Sec. 12530 (10940). Board to provide for compensation of employees and fees of officers.

Sec. 12531 (10941). Who are owners.

Sec. 12532 (10942). Plan of drainage may be changed, how. Note: **this Section is set out in full,** supra.

Sec. 12533 (10943). Board to appoint inspectors—duties and powers of inspectors.

Sec. 12534 (10944). Board of supervisors may issue bonds—how paid—funds, how to be used.—The board of supervisors may, if in their judgment it seems best, issue bonds not to exceed ninety-one per cent of the total amount of the taxes levied under the provisions of section 12511 of this article, in denomination of not less than one hundred dollars, bearing interest from date at a rate not to exceed six per cent per annum, payable semi-annually, to mature at annual intervals within twenty years, commencing after a period of years not later than five years, to be determined by the board of supervisors, both principal and

interest payable at some convenient banking house or trust company's office to be named in said bonds, which said bonds shall be signed by the president of the board of supervisors, attested with the seal of said district and by the signature of the secretary of the said board. All of said bonds shall be executed and delivered to the treasurer of said district, who shall sell the same in such quantities and at such dates as the board of supervisors may deem necessary to meet the payments for the works and improvements in the district. Said bonds shall not be sold for less than ninety-five cents on the dollar, with accrued interest, shall show on their face the purpose for which they are issued, and shall be payable out of money derived from the aforesaid taxes. A sufficient amount of the levee tax shall be appropriated by the board of supervisors for the purpose of paying the principal and interest of the said bonds and the same shall, when collected, be preserved in a separate fund for that purpose and no other. All bonds and coupons not paid at maturity shall bear interest at the rate of six per centum per annum from maturity until paid, or until sufficient funds have been deposited at the place of payment. Any expenses incurred in paying said bonds and interest thereon and a reasonable compensation to the bank or trust company for paying same, shall be paid out of the other funds in the hands of the treasurer and collected for the purpose of meeting the expenses of administration. It shall be the duty of said board of supervisors in making the annual tax levy, as heretofore provided, to take into account the maturing bonds and interest on all bonds, and to make ample provisions in advance for the payment thereof. In case the proceeds of the original tax levy made under the provisions of section 12511 of this article are not sufficient to pay the principal and interest of all bonds issued, then the board of supervisors shall make such additional levy or levies as are necessary for

this purpose, and under no circumstances shall any tax levies be made that will in any manner or to any extent impair the security of said bonds or the fund available for the payment of the principal and interest of the same. Said treasurer shall, at the time of the receipt by him of said bonds, execute and deliver to the president of the board of supervisors of the said district, a bond with good and sufficient sureties, to be approved by the said board of supervisors conditioned that he shall account for and pay over as required by law and as ordered to do by said board of supervisors any and all money received by him on the sale of such bonds, or any of them, and that he will only sell and deliver such bonds to the purchaser or purchasers thereof and according to the terms herein prescribed, and that he will return, duly canceled, any and all bonds not sold to the board of supervisors, when ordered by said board so to do, which said bond shall remain in the custody of the said president of said board of supervisors, who shall produce the same for inspection or for use as evidenced whenever and wherever legally requested so to do. The said treasurer shall promptly report all sales of bonds to the board of supervisors, and the board shall at the proper time, issue warrants for the payment of the maturing bonds so sold and the interest payments coming due on all bonds sold and a reasonable compensation to the bank or trust company, and the said treasurer shall place sufficient funds at the place of payment to pay the same. In case proper warrants are not issued by the board of supervisors as herein provided then the treasurer shall of his own accord place said funds at the place of payment and the canceled bonds and coupons and the receipt of the bank or trust company shall be accepted in lieu of warrants. The successor in office of any such treasurer shall not be entitled to said bonds or the proceeds thereof until he shall have complied with all the foregoing provisions applicable to his predecessor in office: **Provided,**

if it should be deemed more expedient to the board of supervisors, as to moneys derived from the sale of bonds issued, said board may by resolution, select some suitable bank or banks or other depository, as temporary treasurer or treasurers, to hold and disburse said moneys on the orders of the board as the work progresses, until such fund is exhausted or transferred to the treasurer by order of the said board of supervisors. The funds derived from the sale of said bonds or any of them shall be used for the purpose of paying the cost of the levee works and improvements and such costs, expenses, fees and salaries as may be authorized by law and used for no other purpose.

Sec. 12535 (10945). Board of supervisors may levy maintenance tax.—To maintain and preserve the levees or other improvements made pursuant to this article and to strengthen, repair, replace and restore the same, when needed, and for the purpose of defraying the current expenses of the district, the board of supervisors may, upon the completion of said improvements and on or before the first day of September in each year thereafter, **levy an assessment upon each tract or parcel of land and upon corporate property within the district, to be known as a "maintenance tax". Said maintenance tax shall be apportioned upon the basis of the net assessment of benefits accruing for original construction, shall not exceed ten per cent thereof in any one year** and shall be certified to the collector of the revenue of each county in which lands of said district are situate in the same book in like manner and at the same time as the annual tax is certified, but in a separate column, under the heading "maintenance tax". Said collector shall demand and collect the maintenance tax and make return thereof and shall receive the same compensation therefor and be liable for the same penalties for failure or neglect so to do as is provided herein for the annual installment tax.

Sec. 12536 (10946). Adjacent districts, how consolidated.

Sec. 12537 (10947). Time of corporate existence, how extended.

Sec. 12538 (10948). Board may make additional levy of tax, when and for what purposes.—Where the works set out in the "plan for reclamation" of any levee district is insufficient to reclaim in whole or in part any or all of the land and other property of the district the board of supervisors shall have the right to formulate new or amended plans containing new levees or other works, or providing for the enlargement of existing levees or other works, and additional assessments may be made in conformity with the provisions of section 12511, the same to be made in proportion to the increased benefits accruing to the lands and other property because of the additional works. **If it should be found at any time that the amount of total tax levied under the provisions of section 12511 is insufficient to pay cost of works set out in "the plan for reclamation" or additional work done under the provisions of this section, the board of supervisors may make an additional levy** to provide funds to complete the work; **Provided, the total of all levies of such tax does not exceed the total amount of benefits assessed.**

Sec. 12539 (10949). Secretary of board to extend and certify drainage tax to township collectors—duties of collectors—delinquent levee tax, how collected.

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Sec. 12544 (10954). County clerk and treasurer to deliver records and moneys of district to secretary of board.

Sec. 12545 (10955). Liability of reorganized district.

Sec. 12546 (10956). Article, how construed—existing rights not to be affected by this article.

Sec. 12547 (10957). Procedure in dissolving levee district.

(10)

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CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

LILLIAN I. RANDALL,
Petitioner,
vs.
LABADDIE BOTTOMS RIVER PROTECTION DISTRICT OF FRANKLIN COUNTY, MISSOURI, a Corporation,
Respondent.
No. 981.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

LILLIAN I. RANDALL,
Petitioner,
vs.
LABADDIE BOTTOMS RIVER PROTECTION DISTRICT OF FRANKLIN COUNTY, MISSOURI, a Corporation,
Respondent.
No. 981.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

RESTATEMENT OF QUESTIONS PRESENTED BY PETITIONER TO THE SUPREME COURT OF THE UNITED STATES.

The petitioner's statement of the seven questions presented to this Court for decision cannot be approved or accepted under the evidence, the record and the opinion of the Supreme Court of Missouri.

Upon final analysis, the several questions presented seem to narrow down to four propositions. Simply and concisely stated, as we understand them to be, they are:

A.

Were the constitutional rights of petitioner violated by the decision of the Supreme Court of Missouri construing the statutes of Missouri (admitted to be constitutional) with respect to the effect of amending the original Plan of Reclamation of respondent district and by that Court's holding that under the evidence the amendment of said Plan did not constitute an abandonment of the original Plan of Reclamation or of the proceedings, decrees, records, resolutions, levies, contracts or liens perfected thereunder?

B.

Were the constitutional rights of petitioner violated by the decision of the Supreme Court of Missouri construing and applying constitutional statutes of Missouri, with respect to procedure and amendment of pleadings, to permit the plaintiff to amend its petition in this case after trial and before judgment?

C.

Was petitioner denied her constitutional rights by the Supreme Court of Missouri in deciding that **as a matter of law** it could not be held that the lands of petitioner had not been directly benefited by the construction of the improvements provided for in the Plan of Reclamation and amendments thereto, in view of the fact that: (1) Petitioner had offered no evidence tending to show that her lands had not been benefited or that her lands had been inequitably or arbitrarily assessed; (2) petitioner's predecessor in title had filed the original petition praying for the incorporation of respondent District to make the improvements provided for in said Plan of Reclamation; (3) no objections or exceptions had been filed by petitioner's

predecessor in title to the Plan of Reclamation, or the amendments thereto, or to the assessment of benefits against petitioner's land, as permitted by statute?

D.

Were the constitutional rights of petitioner denied by reason of the refusal of the State Supreme Court to transfer the cause to the Court en Banc?

STATEMENT OF FACTS.

To assist the Court in the exercise of its discretion in this matter, we believe it is neccessary in this case to submit a concise statement of the material facts relevant to the issues raised.

The action is to enforce a lien for an unpaid annual installment of levee and maintenance taxes for the year 1934, aggregating $250.02, against certain lands owned by petitioner. The trial court found the issues for plaintiff and entered judgment. Defendant appealed to the Supreme Court of Missouri, which affirmed said judgment.

Respondent District was organized in 1923 and all proceedings for the incorporation and the levying of the tax in question were had under and pursuant to Chapter 28, Article IX, Sections 4597 et seq., Rev. Stat. Mo. 1919 (now Chapter 79, Article VII, Sections 12492 et seq., Rev. Stat. Mo. 1939).

The constitutionality of the statutes is not questioned by petitioner.

The petitioner has not questioned the sufficiency, form or substance of the proceedings had under said statutes (Mo. Sup. Ct. Opinion, pp. 183-184, and p. 17, Petition for Writ of Certiorari).

We shall not detail here the various steps taken in the proceedings of incorporation of the District, the assess-

ment of benefits, the levying of the tax, etc., but if any question should arise as to the facts, the Court will find a detailed statement thereof in the "Findings of Fact" by the trial court (Res. Add. Abs. pp. 84-102). The accuracy and correctness of the facts so stated by the trial court is not questioned by petitioner and no issue has been made as to such findings (Mo. Sup. Ct. Opinion, p. 184).

The petitioner's predecessor in title, with certain other landowners, on June 7, 1923, filed a petition in the Circuit Court of Franklin County, Missouri, for the incorporation of the respondent District, in which it alleged that **the lands in question were in a contiguous body** and prayed that its lands be included in the District; that it desired to form such district for the purpose of having its lands protected from the effect of wash or bank erosion by the Missouri River, and that the **present wash and bank erosion would continue unless protection be had** (Plf. Ex. 1, Res. Add. Abs. pp. 4-9).

Upon the filing of said petition all statutory procedures were had and followed for the incorporation of said District, the election of supervisors and the adoption of a Plan of Reclamation.

The Plan of Reclamation, prepared by engineers, provided for the construction of standard current retards in the Missouri River, at the points where the river was cutting, to prevent bank wash and erosion, the estimated cost of which was $45,000.00; also the Plan provided for certain levees and ditches, the estimated cost of which was $17,000.00. The engineers' report attached to said plan stated:

> "In order to afford protection from erosion by the Missouri River, which, if not prevented, would probably take away most of the lands within the District eventually, a series of Standard Current Retards are to be constructed along the bank where the river is now cutting" (App. Abs. p. 74).

Thereafter, commissioners were duly appointed to assess benefits and damages, who thereafter proceeded, pursuant to statute, to assess benefits and damages, and who subsequently filed, on April 17, 1924, their report in court assessing certain benefits and damages, including an assessment of benefits against the lands of petitioner.

Upon the filing of said report, notice of the filing thereof was given according to section 12508 of the statutes (Plf's Ex. 11, App. Abs. p. 56), and there was a hearing on said report.

Section 12509, Rev. Stat. Mo. 1939, provided that any owner of land in the District could file objections or exceptions to such report and provided for a hearing thereon.

Petitioner's predecessor in title filed no objections or exceptions to the report of commissioners assessing benefits against the land in question, or to the Plan of Reclamation.

Thereafter, on June 18, 1924, upon a hearing, the Court entered its decree confirming said report and the assessment of benefits as therein contained, including the assessment of benefits against the lands of petitioner (Plf's Ex. 12, Res. Add. Abs. p. 25).

No appeal was taken from this decree as was permitted by section 12509.

Thereafter, the Board of Supervisors of the District adopted a formal resolution levying the tax of such proportion of said benefits on all lands, etc., to which benefits had been assessed, as was found necessary to pay the cost of completion of the improvements, and said tax was apportioned as provided by section 12511 of the statutes (Plf. Ex. 33, Res. Add. Abs. pp. 57-69).

A bonding resolution was adopted, as authorized by section 12534 of the statutes, providing for the issuance of bonds of the District in the sum of $70,000.00 (Res. Add. Abs. pp. 57-69). The bonds were subsequently sold and

the proceeds used for the construction of the planned improvements (Res. Add. Abs. pp. 56-57).

In July, 1924, pursuant to section 12510, a contract for the construction of the current retards was let for $44,400.00, and a contract for the construction of the earthworks was let, all of which works were to be completed within six months (Plf. Ex. 31, Res. Add. Abs. pp. 56-57).

On October 15, 1924, during the progress of the construction of the improvements, a petition was filed in the Circuit Court asking permission **to amend** the original Plan of Reclamation in certain minor respects (Plf. Ex. 13, **App.'s** Abs. pp. 57-62).

After notice and hearing on the petition to amend, the Circuit Court, on December 29, 1924, granted permission **to amend** the original Plan of Reclamation in certain respects (Plf.'s Ex., **Res.** Add. Abs. pp. 38-41). This amendment was made pursuant to Sections 12538 and 12532, Rev. Stat. Mo. 1939. No exceptions or objections were filed to such amendments.

Commissioners were appointed to assess any benefits and damages which might accrue under the amendments to the original plan. Commissioners filed their report; notice was given to property owners; no exceptions or objections being filed, the Circuit Court on August 13, 1925, confirmed said report. Sec. 12509, Rev. Stat. Mo. 1939, provided that exceptions or objections could be filed to the report of commissioners.

The said report of commissioners assessing benefits and damages on the plan as amended was the same as on the original plan, except as to those few landowners who were affected by the amendments, and the two reports of commissioners were identical so far as appellant's lands were concerned (Res. Add. Abs. pp. 23-24 and pp. 43-44).

The estimated additional costs of constructing the small amount of extra work required by reason of the amend-

ments to the original Plan of Reclamation did not necessitate raising any additional funds by the District and therefore the Board of Supervisors, **pursuant to Section 12538**, Rev. Stat. Mo. 1939, elected not to make any additional levy of tax based upon the decree of August 13, 1925, their levy of tax under the decree of June 18, 1924, being sufficient.

Section 12538, Rev. Stat. Mo. 1939 (hereinafter set forth in appendix hereto), provided that where the works set out in the Plan of Reclamation is found insufficient, the Board of Supervisors shall have the right to formulate amended plans containing new levees or other works, or providing for the enlargement of existing levees or other works, and that "additional assessments **may** be made" in conformity with the provisions of section 12511, the same to be made in proportion to the increased benefits accruing to the lands and other property because of the additional works.

The Taxing Resolution of September 30, 1924, and the Levy Tax Record based thereon, and the other records and proceedings resulting in the levying of the tax in question, were all based on the final decree of June 18, 1924.

The annual installment and maintenance tax for 1934 was levied by resolution of the Board of Supervisors on August 27, 1934, pursuant to section 12512 (Plf. Ex. 37, Res. Add. Abs. p. 69). The foundation for this resolution was the final decree of June 18, 1924 (Plf. Ex. 12, Res. Add. Abs. p. 25); the formal taxing resolution adopted by the Board on September 30, 1924 (Plf. Ex. 33, Res. Add. Abs. pp. 57-69), and the levy tax record filed on September 20, 1924 (Plf. Ex. 24, Res. Add. Abs. pp. 51-55).

The petitioner contends now (about eighteen years after the event) that by reason of the amendment to the original Plan of Reclamation, all decrees, proceedings, records,

levies, assessments, liens, contract obligations, etc., made prior to the amendment, were abandoned and became null and void and that none of such decrees and records could furnish any basis for the levying of the annual installment and maintenance tax for the year 1934 by resolution adopted August 27, 1934.

At the time of the filing of the petition to amend the original Plan, bonds of the respondent District in the sum of $70,000.00 had been authorized, issued, sold and were outstanding, and the money therefrom had been received by the District; the taxing resolution and bonding resolution of September 30, 1924, had all been duly adopted; the levy tax record had been prepared and filed; contracts for the construction of the improvements described in the Plan had been let in July, 1924, and, at the time the Court entered its decree on December 29, 1924, permitting the amendment, the construction of the improvements provided for had been in a large measure completed.

The amount of work under the amended plan was not decreased but it was increased to some extent. The benefits assessed against the lands of petitioner were not affected or changed in any way, nor were her lands affected in any way by said amendments.

The first annual installment and maintenance tax levied was for the year 1924.

The first delinquency in payment of the annual levy against petitioner's lands involved taxes for the year 1928.

In July, 1930, Labaddie Bottoms River Protection District, a corporation, as plaintiff, filed suit against Point Prairie Hunting and Fishing Club, a corporation, for delinquent taxes due said District for the years 1928 and 1929, assessed against the lands now owned by petitioner, in which suit judgment was rendered in favor of plaintiff

and against defendant, Point Prairie Hunting and Fishing Club. Thereafter a special execution was issued on said judgment and the lands then owned by Point Prairie Hunting and Fishing Club, a corporation, were sold by the Sheriff under such execution sale to this petitioner, Lillian I. Randall, and the Sheriff executed and delivered on March 16, 1931, five deeds for each of the five separate tracts of land to petitioner, Lillian I. Randall, which deeds were duly recorded (Plf. Exs. 38-40, Res. Add. Abs. pp. 72-80 and p. 100).

After Lillian I. Randall, petitioner herein, purchased said lands at said tax sale, she voluntarily paid to the respondent District the taxes which were due for the year 1930 (App. Abs. pp. 139-140 and Resp. Add. Abs. p. 100).

In 1932 Labaddie Bottoms River Protection District filed suit against Lillian I. Randall for delinquent taxes for the year 1931; Lillian I. Randall denied liability on the ground that her lands were not within the limits of said District and that the lands had not been benefited by the Plans of Reclamation; that upon a trial of said cause, judgment was rendered in favor of plaintiff and against defendant, Lillian I. Randall, who appealed to the St. Louis Court of Appeals, in which court said judgment was affirmed in the case of **Labaddie Bottoms River Protection District v. Randall, 68 S. W. (2d) 871.** In this case the petitioner made no claim of violation of any constitutional rights.

Thereafter, Lillian I. Randall paid 1931 taxes to respondent District (App. Abs. pp. 139-140).

On October 12, 1935, Lillian I. Randall filed a suit in equity against Labaddie Bottoms River Protection District, as defendant, in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, which said suit raised constitutional questions and issues as to the viodness of assessments of benefits by

respondent District upon the lands of petitioner; that a trial of said suit was had and on March 23, 1938, a judgment and decree was entered against Lillian I. Randall and in favor of Labaddie Bottoms River Protection District (App. Abs. p. 41).

At the trial of the present case in the Circuit Court of Franklin County, at the conclusion of all the evidence and before judgment, the plaintiff, by leave of Court, amended its petition by striking the word "amended" before the words "Plan of Reclamation" in some five places in the amended petition. This amendment was allowed by the trial court pursuant to Sections 971, 970, 973, 969, Rev. Stat. Mo. 1939. (Hereinafter set forth in the Appendix.) Petitioner filed no affidavit showing that she was surprised or misled, nor did she ask any continuance, or for an opportunity to obtain or present any evidence which she deemed might be necessary because of such amendment. With reference to the materiality of said amendment, petitioner heretofore stated in the Supreme Court of Missouri:

> "It is not at all clear that plaintiff succeeded in amending its petition so as to state a different cause of action * * *" (Record, p. 192).

Respondent offered no evidence to sustain any of the allegations contained in her answer and replication, or to show that her lands had not been benefited by the construction of the improvements provided for in the Plan of Reclamation and the amendment thereto. Respondent offered no evidence of any fraud, or of any inequitable, arbitrary, illogical or discriminatory assessment, or of any abuse of power or authority.

Errors of Fact Appearing in Petition for Writ of Certiorari and Brief.

There are certain errors of fact appearing in the petition and brief which tend to confuse the issues, to which we find it necessary to refer:

1. Throughout the petition and brief the lands of petitioner are referred to as an "island," for example:

> **Page 14.** "petitioner's lands constitute an island in the Missouri River separated from the other and shore lands constituting the district by a wide slough * * *."
>
> **Page 15.** "that nevertheless petitioner's island was assessed on a parity with lands on the mainland of like elevation * * *."
>
> **Page 21.** "Petitioner's lands constitute an island in the Missouri River, separated from the mainland by a wide slough, * * *."

These statements tend to mislead. The lands of petitioner do not constitute an island and they have been a part of the mainland for a great many years (Plf. Ex. 14, Abs. p. 66 et seq.). The area shown on the plat immediately south of petitioner's lands were marked "unknown," not because they were in the river or under water, but because at the time of the preparation of the plat the ownership of such accreted lands had not been determined judicially. Consequently, assessment was against unknown owners.

Petitioner's predecessor in title in its petition praying for the construction of improvements to protect its lands from wash and bank erosion by the Missouri River, alleged that its acreage and that of the other property owners constituted "**a contiguous body of lands** situate in Franklin County, Missouri, and subject to overflow, wash or bank erosion" (Plf. Ex. 1, Res. Sup. Abs. p. 5).

The trial court found that lands of defendant were contiguous to other lands in the District and "her said lands are not detached from other lands within said District" (Res. Add. Abs. p. 102).

2. It is stated by petitioner:

> **Page 6.** "Whether the judgment of the State Supreme Court, which adjudged and enforces in favor of respondent a lien upon petitioner's lands, as for an annual levy on a total tax against an assessment of benefits to accrue from the making of a planned local improvement **which in fact was not made** * * *."
>
> **Page 6.** "* * * but respondent **not having constructed** and not intending to make the improvement"
>
> **Page 41.** "The sole evidence before the State Circuit Court on the question of benefits, and it probably was the only competent evidence, was respondent's original plan of reclamation, **under which no improvement was made** * * *."

These and similar statements might lead this Court to believe that none of the improvements provided for under the Plan of Reclamation was made. This is not correct. The contracts for the construction of the improvements mentioned in the original Plan had been let in July, 1924 (Res. Add. Abs. pp. 56-57), all to be completed within six months, and the major portion of the work provided for in the Plan of Reclamation had been completed by December 29, 1924, at which time permission was granted by the Court to amend the Plan in certain minor respects. After the Plan was amended, the additional work contemplated by such amendments was also fully carried out and performed.

3. It is stated by petitioner:

> **Page 21.** "When respondent had caused to be made the necessary surveys and estimates of the cost pre-

liminary to its adoption of its official 'Plan of Reclamation,' it found and concluded that it could not carry out the intention of the landowners on whose petition it had been incorporated to enclose within its levees all the lands within its corporate boundaries, for the reason that the cost of building its levees across the slough at both ends of petitioner's island so as to enclose the islands and intervening slough within its levee would be prohibited."

No basis for this statement can be found in the record.

The engineer's report accompanying the Plan of Reclamation did not contemplate the inclusion of all of the lands within the District within the levee.

At the time the plan was adopted the lands of the petitioner were owned by a hunting and fishing club. This hunting and fishing club wanted protection from wash and bank erosion (which is the protection it received under the Plan and for which protection it was assessed benefits) and said club did not want its lands included within the levee; it was not engaged in agriculture, but its lands were used for club purposes; accordingly the levee was not extended around its lands.

The assessment of benefits against petitioner's lands, covering her pro-rata cost of protection against wash and bank erosion, averaged $15.00 per acre (Res. Add. Abs. p. 91). The assessment of benefits against other landowners situated immediately south of petitioner's lands, but within the levee, averaged $21.00 to $25.25 per acre. The cost of retards for protection against wash and bank erosion was $44,400.00, and the cost of ditches, levees, bridges, etc., aggregated approximately $17,000.00. It will be observed that petitioner's lands were assessed on a pro-rata basis according to the benefits derived by such lands from the construction of retards in the river to prevent destruction of her lands from wash and bank erosion.

4. It is stated by petitioner:

> **Page 24.** "In the particular case respondent and the Commissioners disregarded the provision of the statute of general application for so classifying the lands and adopted and applied a special and unauthorized classification under which it classified them solely on the basis of elevation, without regard to whether or not they would receive any benefit from the levees and incidental works provided to be constructed. As a result of employing this classification for making its assessment, an assessment of benefits was made in both cases against petitioner's lands and in both cases arbitrarily in an amount on substantial parity with assessments made against other lands in the district of like elevation and which were provided to be enclosed within the proposed levees and afforded protection by the levees and incidental improvements provided in the plans."

No evidence can be found in the record to support these statements.

If the Commissioners did not comply with the law (of which there is no evidence), petitioner's predecessor in title could have filed eighteen years ago, as permitted by Section 12509, R. S. Mo. 1939, exceptions and objections to the report of the Commissioners which was filed on April 17, 1924.

If the Commissioners did not comply with the law, such facts should have been pleaded in the prior suit against Lillian I. Randall for taxes for the year 1931 and also in the present suit, and petitioner should have offered evidence to support such statements.

The trial court found that the Commissioners made the assessment in accordance with the statutory requirements (Res. Add. Abs. pp. 88-91).

The statement that petitioner's lands were assessed

"arbitrarily in an amount on substantial parity with assessments made against other lands in the District of like elevation * * * within the proposed levees * * *" is not supported by any evidence. Petitioner offered no evidence. Nothing can be found in the record tending to show any arbitrary, inequitable, illogical or unjust assessment. The trial court found that "there was no evidence tending to establish that the assessment against defendant's lands was inequitable, illogical, arbitrary or discriminatory" (Res. Add. Abs. p. 102).

BRIEF.

I.

No federal question in this case, because the decision of the state court involved the determination of certain questions of fact, correctly decided upon the evidence, and the construction of certain state statutes, admitted to be constitutional, and their application to such determined facts.

(1) Findings of fact by state courts, when supported by the evidence, are binding on this Court.

Interstate Amusement Co. v. Albert, 239 U. S. 560, l. c. 566;
King v. West Va., 216 U. S. 92;
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86;
Smiley v. Kansas, 196 U. S. 447;
Clipper Mining Co. v. Eli Mining & Land Co., 194 U. S. 220.

(2) The ascertainment of what is essential under the state statute is a state question within the final jurisdiction of the highest court of the state. When the state court decides that a particular formality was or was not essential under a state statute, such decision presents no federal question.

Marchant v. Penn. R. R. Co., 153 U. S. 380, l. c. 385 et seq.;
Baltimore Tr. Co. v. Baltimore Belt R. R. Co., 151 U. S. 137, l. c. 138.

(3) The meaning attributed by the Supreme Court of Missouri to a statute of Missouri must be accepted by this Court, on review, as though such meaning had been specifically expressed in the statute.

Supreme Lodge Knights of Pythias v. Meyer, 265 U. S. 30, l. c. 32;

Guaranty Trust Co., Ex., v. Blodgett, 287 U. S. 509, l. c. 513;
Roe v. Kansas, 278 U. S. 191, l. c. 193;
Kersh Lake Drainage Dist. v. Johnson, 309 U. S. 485;
Bacon & Sons v. Martin, 305 U. S. 380, l. c. 381.

(4) The Supreme Court, as a general rule, will follow the construction given a state statute by the highest court of the state in order to determine whether a federal question is involved within its meaning.

McElvaine v. Brush, 142 U. S. 155, l. c. 160;
Quong Ham Wah Co. v. Industrial Comm., 255 U. S. 445, l. c. 448.

(5) A decision of a state court resting upon the construction, and not upon the validity, of the state statute, does not present a federal question.

Snell v. Chicago, 152 U. S. 191.

(6) The due process clause of the Fourteenth Amendment does not control methods of statutory procedure or give jurisdiction to this Court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters nonfederal in character.

McDonald v. Oregon R. R. & Nav. Co., 233 U. S. 665;
Kansas City So. Ry. Co. v. Road Improvement Dist., 266 U. S. 379.

II.

No federal question was decided by the state court, nor was the decision of any federal question necessary by said Court for a determination of said cause.

(1) Where no federal or constitutional question was involved or decided by a state court, and the decision of a federal question by the state court was not necessary to a determination of the case, then the writ should not be granted.

Adams v. Russell, 229 U. S. 353, l. c. 358 et seq.;
Snell v. Chicago, 152 U. S. 191, l. c. 196.

(2) The challenged decision of the state court rests upon independent grounds, not involving a federal question, and is broad enough to maintain the judgment. Therefore, the petition for a writ of certiorari should be denied without considering any federal question that also may have been presented.

Murdock v. Memphis, 20 Wall. (87 U. S.) 590;
Leathe v. Thomas, 207 U. S. 93;
Ark. So. R. R. Co. v. German Nat. Bank, 207 U. S. 270;
Waters Pierce Oil Co. v. Texas, 212 U. S. 112;
Susquehanna etc. v. State Tax Com., 283 U. S. 291, l. c. 300.

(3) The state court decided this case upon grounds which had no relation to any federal question. There is no pretense that the state court adopted its view of a non-federal question in order to evade an issue under the Federal Constitution. Under such conditions, this Court will accept the decision of the state court, whether right or wrong.

Nickel v. Cole, 256 U. S. 222, l. c. 225.

(4) According to the well-established doctrine of this Court with respect to cases coming from state courts, unless a decision upon a federal question was necessary to the judgment, or in fact was made the ground of it, the writ must be dismissed. And even when an erroneous decision upon a federal question is made a ground, if the judgment also is supported upon another which is adequate by itself, and which contains no federal question, the same result must follow, as a general rule. Moreover, ordinarily this Court will not inquire whether the decision upon the matter not subject to its revision was right or wrong.

Ark. So. R. R. Co. v. German Nat. Bk., 207 U. S. 270;
Allen v. Arguimbau, 198 U. S. 149.

(5) Even though the state court had considered and determined a federal question, nevertheless, since the judgment of the state court against petitioner was based upon a decision of general law broad enough to support the decision, the Supreme Court will not consider the federal question.

Municipal Sec. Co. v. Kansas City, 246 U. S. 63;
Bilby v. Stewart, 246 U. S. 255;
Minn. etc. Ry. v. Washburn Lignite Coal Co., 254 U. S. 370.

(6) Even if a federal question be involved, nevertheless there is also an independent ground of state procedure as the basis of the decision below, involving no federal question, and broad enough to sustain the judgment. Therefore this Court is without jurisdiction.

Doyle v. Atwell, 261 U. S. 590;
McCoy v. Shaw, 277 U. S. 302.

And this is true even though this Court might think that the position of the state court is unsound.

Klinger v. Missouri, 13 Wall. 257, 20 L. Ed. 635.

III.

The questions submitted by petitioner to this Court are, under the evidence, unsubstantial, devoid of merit, fictitious and frivolous, and therefore the writ should be denied.

Miller & Lux v. Sacramento Drainage Dist., 256 U. S. 129;
House v. Road Imp. Dist., 266 U. S. 175;
Campbell v. Olney, 262 U. S. 353;
Parker v. McLain, 237 U. S. 469.

IV.

Petitioner's constitutional rights were not violated by reason of the trial court granting permission to plaintiff to amend its petition.

(1) It is not the function of the Supreme Court of the United States to decide local questions, and the final judgment of the state court must be taken as determining that the procedure adopted satisfied all state requirements.

United Gas Co. v. Texas, 303 U. S. 123, l. c. 139.

(2) Irregularities and errors in proceedings under a state statute can be corrected in state courts only. Due process of law does not mean that the Federal Government guarantees the correctness of every decision of a state court.

Central Land Co. v. Laidley, 159 U. S. 103, l. c. 110.

(3) The due-process clause of the Fourteenth Amendment does not control methods of statutory procedure or give jurisdiction to this Court to review mere errors of law alleged to have been committed by a state court in

the performance of its duties within the scope of its authority concerning matters non-federal in character.

McDonald v. Oregon R. R. & Nav. Co., 233 U. S. 665;
Kansas City So. Ry. Co. v. Road Improvement Dist., 266 U. S. 379.

(4) Irregularities and mere errors in proceedings under the state statute in question are not material for purposes of appellate review by this Court. The question before the Court is not whether the courts below having jurisdiction of the case and the parties have followed the law, but whether the law, if followed, would have furnished the protection guaranteed by the Constitution. The authority of the Supreme Court does not extend beyond an examination of the power of the courts below to proceed at law under the facts and the law applicable.

Marrow v. Brinkley, 129 U. S. 178.

(5) Under the statutes of Missouri the trial court properly exercised its discretion in permitting plaintiff in this case to amend its petition in the manner specified.

1939 R. S. Mo., Sec. 971;
1939 R. S. Mo., Sec. 973;
1939 R. S. Mo., Sec. 970;
1939 R. S. Mo., Sec. 969.

(6) The discretion of the trial court in allowing amendments under Sec. 971 will not be interfered with on appeal unless it has been abused.

Laughlin v. Leigh, 226 Mo. 639;
Moore v. Mansfield (Mo.), 286 S. W. 353;
Amos v. Fleming et al., 221 Mo. App. 559;
Lynn v. Assur. Co. (A.), 111 S. W. (2d) 231;
Simon v. Kresge Co. (A.), 103 S. W. (2d) 523;
Wooldridge v. Scott (A.), 102 S. W. (2d) 958;
Cramer v. Parker (A.), 100 S. W. (2d) 640;

Realty Co. v. Kleine (A.), 82 S. W. (2d) 605;
Dyer v. Harper, 336 Mo. 52;
Oliver v. Wilkey (A.), 62 S. W. (2d) 776;
Growers' Ass'n v. Sullinger (A.), 45 S. W. (2d) 887;
Bradley v. Page (A.), 46 S. W. (2d) 208.

(7) Courts are liberal in granting amendments where cause of action is not changed.

Scott v. Public Service Co. (A.), 115 S. W. (2d) 518;
Woolridge v. Milling Co. (A.), 102 S. W. (2d) 958;
Jensen v. Hinderks, 338 Mo. 459;
Payne v. Ins. Co., 229 Mo. App. 901.

(8) Under Section 969 no variance between the allegations in the pleading and the proof is material unless the opposite party has been actually misled thereby to his prejudice.

Fischer v. Max, 49 Mo. 404;
Olmstead v. Smith, 87 Mo. 602;
Evans v. Evans, 52 S. W. 12;
Horse Co. v. Bennett, 52 Mo. App. 333;
Ridgeway et al. v. Railway, 161 Mo. App. 260.

(9) The party complaining of a variance between the pleading and the proof must not only interpose a timely and specific objection to the introduction of the evidence offered but must file affidavit of surprise, and if he fails to do so, it is too late to complain in the appellate court.

Bank v. Phillips, 179 Mo. App. 488;
Thomas v. Construction Co., 189 Mo. App. 623;
Mekos v. Fricke, 159 Mo. App. 631;
Huggins v. City of Hannibal (A.), 12 S. W. (2d) 504;
Oaks v. Short (A.), 292 S. W. 738;
Walton v. Carlisle, 313 Mo. 281;
Bammert v. Kenefick (Mo.), 261 S. W. 78;
Powell v. Schofield (A.), 15 S. W. (2d) 876;
Swift v. Ry. Co. (A.), 15 S. W. 964.

(10) Under Section 969 an affidavit setting forth in what respect a party has been misled is the only test of the materiality of a variance.

Gaty v. Sack, 19 Mo. App. 470;
Bigham v. Tinsley, 149 Mo. App. 468;
Mekos v. Fricke, 159 Mo. App. 631.

(11) And the variance can only be taken advantage of by such affidavit.

Olmstead v. Smith, 87 Mo. 602;
Meyer v. Chambers, 68 Mo. 626;
Ferris v. Thaw, 72 Mo. 446;
Brown v. Ry. Co., 31 Mo. App. 661;
Mellor v. Ry. Co., 105 Mo. 455;
Newton v. Harvey (A.), 202 S. W. 249.

(12) Where no affidavit of surprise because of an amendment is filed, it is not error to refuse a continuance after allowing the amendment.

Brinkman v. Luhrs, 60 Mo. App. 512.

V.

Constitutional rights of petitioner were not violated by refusal of State Supreme Court to transfer the cause to the Court en banc.

State v. Moore, 159 U. S. 675.

VI.

The decision of the Supreme Court of Missouri, under the evidence, was correct, and it did not deny, impair or infringe in any manner whatsoever any of petitioner's constitutional rights, and her petition for a writ of certiorari should be denied.

This statement is supported by the following authorities, to wit:

(A) The Actions and Conduct of Appellant and Her Predecessor in Title Preclude the Assertion of the Claims Now Made by Her.

(1) The appellant stands in the position of her predecessor in title.

Bartlett Trust Co. v. Elliott, 30 Fed. (2d) 700, l. c. 705, aff. in 40 Fed. (2d) 351;
Shepard v. Barren, 194 U. S. 553, l. c. 567;
English v. Arizona, 214 U. S. 359, l. c. 365;
Wright v. Davidson, 181 U. S. 371, l. c. 377.

(2) A landowner who was a petitioner for the organization of the drainage district cannot object to the validity of the organization and assessments therein in a suit against him for delinquent taxes. That would amount to a collateral attack, which is prohibited.

State ex rel. James v. Young, 255 Mo. 627, 164 S. W. 579;
State ex rel. v. Galloway, 255 Mo. 637, 164 S. W. 581;
Mingo Drainage Dist. v. Railway, 281 S. W. 60.

(3) It is a well-settled rule that one who has himself invoked a statute, or who has received the benefits flowing from a statute, is estopped to assail the action taken by the state court when he becomes dissatisfied with the result, or to assert the unconstitutionality of the state court proceeding.

Wall v. Parrott Silver & Copper Co., 244 U. S. 407, l. c. 411;
Daniels v. Tearney, 102 U. S. 415, l. c. 421;
Grand Rapids & I. R. Co. v. Osborne, 193 U. S. 17;
United Fuel Gas Co. v. Railroad Com., 278 U. S. 300, l. c. 307;
Owens v. Corporation Com., 41 Fed. (2d) 799.

(4) Where the landowner is given an opportunity in the organization of the district to file exceptions to the report

of the commissioners in the assessment of benefits and damages and is also given the right to have a hearing by the Court thereon, and that, having failed to exercise this right or to raise the question as to benefits to his land, or if raised in that proceeding for the Court to determine the matter adversely to him, would necessarily conclude the landowner and prevent him from raising the same question at a later time.

Labaddie Bottoms River Protection Dist. of Franklin County v. Randall, 68 S. W. (2d) 871, l. c. 873;
Garden of Eden Drainage District v. Bartlett Trust Co. et al., 330 Mo. 554, 50 S. W. (2d) 627, 84 A. L. R. 1078;
In re Mingo Drainage District, 267 Mo. 268, l. c. 284, 183 S. W. 611;
Little River Drainage District v. St. Louis, M. & S. E. Railroad, 236 Mo. 94, 139 S. W. 330;
U. S. v. Payne, 264 U. S. 446, l. c. 454;
Beck v. Mo. Valley Drainage District, 46 Fed. (2d) 632 (certiorari denied 284 U. S. 618).

(5) Where landowners paid two years taxes to the district based on estimated benefits, they thereby acquiesced in and ratified said assessment of benefits and should not be heard to complain that they were not notified thereof.

Bartlett Trust Co. v. Elliott, 30 Fed. (2d) 700, aff. in 40 Fed. (2d) 351;
State ex rel. v. Bates, 235 Mo. 262;
Stamper v. Roberts, 90 Mo. 683.

(6) Appellant and her predecessor in title has waived any right which she might have to complain as to the assessment of taxes and has been guilty of laches.

Bartlett Trust Co. v. Elliott, 30 Fed. (2d) 700, aff. in 40 Fed. (2d) 351.

(7) Appellant and her predecessor in title stood by and knew that bonds were being sold to provide funds for the execution of the plans for reclamation; they saw the plan being executed and are now enjoying the benefits conferred by the execution of said plan. This constitutes an estoppel.

Bartlett Trust Co. v. Elliott, 30 Fed. (2d) 700, aff. in 40 Fed. (2d) 351;
State ex rel. v. Bates, 235 Mo. 262.

(8) The question of whether or not appellant's lands have been benefited by the reclamation work is res adjudicata, for the reason that it was first affirmatively settled by the adjudication of the Circuit Court of Franklin County in the proceedings for the incorporation of the District and was subsequently reiterated by both the Circuit Court of Franklin County and the St. Louis Court of Appeals in the litigation instituted by plaintiff District for the collection of annual assessments.

Labadie Bottoms River Protection Dist. v. Randall, 68 S. W. (2d) 871.

(B) Appellant's Constitutional Rights Have Not Been Denied, Impaired or Infringed in Any Manner Whatsoever.

(1) The fact that a person's property has been included in a reclamation district in no manner impairs or transgresses his constitutional rights provided he is given the right at some stage of the proceeding to have the hearing upon the question of benefits and damages.

Beck v. Missouri Valley Drainage Dist., 46 Fed. (2d) 632 (certiorari denied 284 U. S. 618, l. c. 635-636);
Bartlett Trust Co. v. Elliott, 30 Fed. (2d) 700, l. c. 704 (affirmed 40 Fed. [2d] 351);
Embree v. Kansas City and Liberty Blvd. Road Dist., 240 U. S. 242;
Toncray v. City of Phoenix, 47 Fed. (2d) 448.

Even if the lands received no direct benefits, that per se is not enough to exempt them under the Fourteenth Amendment.

Miller & Lux, Inc., v. Sacramento Drainage Dist., 256 U. S. 129;
House v. Road Imp. Dist., 266 U. S. 175.

(2) Neither the appellant nor her predecessor in title having filed exceptions to the report of the commissioners, she is not now entitled to invoke the matters complained of for the reason that where a party fails or refuses to avail himself of the opportunity provided by law in the proceeding for the incorporation of a reclamation district to object to the plan or the assessments or any defects or inequalities therein, he will not later be permitted to question upon constitutional grounds the benefits assessed.

Toncray v. City of Phoenix, 47 Fed. (2d) 448, l. c. 451;
Utley v. City of St. Petersburg, 292 U. S. 106, 54 Sup. Ct. 393, l. c. 595;
Bartlett Trust Co. v. Elliott, 30 Fed. (2d) 700, l. c. 704-5;
Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, l. c. 157;
Davidson v. New Orleans, 96 U. S. 97, l. c. 104-5;
Farncomb v. Denver, 252 U. S. 7, l. c. 11;
First National Bank v. Board of County Commissioners, 264 U. S. 450.

(3) In the absence of fraud or an unquestionable showing that the assessment complained of is so grossly inequitable, illogical, palpably arbitrary and discriminatory as to disclose a clear abuse of power and authority, a court will have no jurisdiction on constitutional grounds to review assessments made by a reclamation district incorporated under state law or municipal ordinance.

Valley Farms v. Westchester, 261 U. S. 155;
Miller & Lux, Inc., v. Sacramento Drainage Dist., 256 U. S. 129;

St. Louis Land Co. v. Kansas City, 241 U. S. 419, l. c. 429-30;
Embree v. Kansas City Road Dist., 240 U. S. 242;
Mt. St. Mary's Cemetery v. Mullins, 248 U. S. 501.

(a) The cases cited and relied upon by appellant are readily distinguishable from the foregoing authorities as is evident from the following local citations, where may be found either distinguishing facts, important differentiations or correct statements of the rule applicable in cases such as the present:

Yick Wo v. Hopkins, 118 U. S., l. c. 358-9, 366-7, 373-4;
The Virginia Coupon Cases, 114 U. S., l. c. headnote 1, at page 270;
Myles Salt Co. v. Iberia Drainage Dist., 239 U. S., l. c. 481, 482-3, 485;
N. C. & St. L. Railway Co. v. Walters, 294 U. S., l. c. 412;
Gast Realty Co. v. Schneider Granite Co., 240 U. S., l. c. 58-60;
Norwood v. Baker, 172 U. S., l. c. 279.

(4) Where a party or his predecessor in title asks for and encourages the levy of a tax he will be estopped to complain of its illegality, as constitutional guaranties may be waived just as any other substantive rights. Such rule is applicable to the instant proceeding, as the Point Prairie Hunting & Fishing Club, from whom appellant acquired title, stated in the petition for the formation of the plaintiff district that they desired "to form a levee district for the purpose of having the lands and other property * * * protected from the effect of wash or bank erosion by the Missouri River"; that the protection of the lands hereinafter described from bank wash or erosion by the waters of the Missouri River will be a public utility and benefit, and will be conducive to better health, convenience and

welfare, and will render said lands more valuable and fit for agricultural purposes''; and ''that the present wash or bank erosion of the lands in said district will continue unless protection be had.'' Moreover, the hunting and fishing club stood by with tacit approval while the improvements were being made and bonds issued and sold to pay for said improvements. Subsequently both the hunting and fishing club and the appellant voluntarily paid the benefit assessments for a number of years.

Wright v. Davidson, 181 U. S. 371, l. c. 377;
Shepard v. Barron, 194 U. S. 553, l. c. 567;
English v. Territory of Arizona, 214 U. S. 359, l. c. 365;
Bartlett Trust Co. v. Elliott, 30 Fed. (2d) 700, l. c. 705 (affirmed 40 Fed. [2d] 351);
Utley v. City of St. Petersburg, 292 U. S. 106, l. c. 111, 109, 54 Sup. Ct. 593;
Dunn v. Fort Rend County, 17 Fed. 329, l. c. 333;
Toncray v. City of Phoenix, 47 Fed. (2d) 448, l. c. 451.

ARGUMENT.

A.

Petitioner's Contention That Her Constitutional Rights Were Denied by the Decision of the Supreme Court of Missouri Holding That the Amendment of the Original Plan of Reclamation Did Not Operate as an Abandonment of the Original Plan of Reclamation and of All Proceedings, Decrees, Records, Resolutions, Levies and Liens Thereunder, and That Consequently the Annual Levy of Installment and Maintenance Taxes for the Year 1934, Based Upon Such Original Plan and Proceedings, Was Not Void, Presents No Federal Question, Is Not a Sound Contention, Is Devoid of Merit, Is Fictitious and Frivolous.

1. The question decided by the state court involved a determination of questions of fact, under the evidence, and the construction of Chapter 79, Article VII, Sections 12494 et seq., Revised Statutes of Missouri 1939, and particularly section 12538, as applicable to such facts.

The constitutionality and fairness of the statutes is not questioned by petitioner.

This Court has generally held that where a state statute is admitted to be valid (which is the situation here), and the only question is whether it has been correctly construed, the Supreme Court of the United States has no jurisdiction (Cases, Brief Point I).

The due-process clause of the Fourteenth Amendment does not control methods of statutory procedure, or give jurisdiction to this Court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters nonfederal in character (Cases, Brief Point I).

The Supreme Court of Missouri held that under Section 12538, Revised Statutes of Missouri 1939, it was not obligatory or compulsory upon the respondent District to make additional assessments merely because the original Plan of Reclamation was amended. The construction of said statute, as given by the Supreme Court of Missouri, should be accepted by this Court.

The ascertainment of what is essential under the state statute is a state question within the final jurisdiction of the highest court of the state. When the Supreme Court of Missouri decided that a particular formality was or was not essential under the state statute, such decision presents no federal question (Cases, Brief, Point I).

This Supreme Court, as a general rule, will follow the construction given a state statute by he highest court of the state in order to determine whether a federal question is involved within its meaning.

2. The decision of the Supreme Court of Missouri turned upon the determination of a question of fact.

The state court held that upon the evidence and the record before it there had been no "abandonment" of the original Plan of Reclamation and that there was no "substitution" of a new Plan of Reclamation for the original plan, but that the original Plan of Reclamation had merely been amended.

This was a question of fact, and the Supreme Court of the United States will follow such findings of fact as are made by the state court (Cases, Brief, Point I).

3. The state court did not decide any constitutional question nor was it necessary to decide any constitutional question.

Petitioner's claim that her constitutional rights were violated was **based solely and exclusively** on the ground that the amendment of the original Plan of Reclamation

operated as a complete and "**total abandonment**" of the original Plan of Reclamation and of all proceedings, decrees, record, resolutions, levies or liens thereunder.

When the Supreme Court of Missouri found the fact to be and held that there was no abandonment of the original Plan of Reclamation and the proceedings had thereunder, there was then no federal question before the Supreme Court of Missouri to be decided. Consequently, the state court did not decide any federal question. There was no constitutional question before it for decision under the facts which were found to exist, nor was the decision of the Supreme Court of any federal question necessary by said Court for a determination of said cause. The decision of the Supreme Court of Missouri rests upon independent grounds, which are broad enough to maintain the judgment.

This Court has held in many cases that where the challenged decision of the state court rests upon independent grounds, not involving a federal question, and is broad enough to maintain the judgment, a petition for a writ of certiorari should be denied without considering any federal question that also may have been presented (Cases, Brief, Point II).

This Court has also held that, even though the state court had considered and determined a federal question, nevertheless, since the judgment of the state court against the petitioner was based upon a decision of general law broad enough to support the decision, the Supreme Court of the United States will not consider the federal question (Cases, Brief, Point II).

The Supreme Court of Missouri decided this case upon grounds which had no relation to any federal question. There is no pretense here that the state court adopted its view of a nonfederal question in order to evade an issue under the Federal Constitution. Under these conditions,

this Court will accept the decision of the state court, whether right or wrong.

According to the well-established doctrine of this Court, unless a decision upon a federal question was necessary to the judgment or in fact was made the ground of it, the petition for the writ should be denied; and even when an erroneous decision upon a federal question is made a ground, if the judgment also is supported upon another which is adequate by itself, and which contains no federal question, the same result must follow as a general rule [Cases, Brief, Point II (4)].

4. The decision by the state court that there had been no abandonment of the original Plan of Reclamation or of the proceedings had thereunder by reason of an amendment having been made to said plan at a later date is clearly a correct determination of the facts under the evidence.

After the original plan had been filed and notice of the filing given, Commissioners were appointed by the Court to assess benefits and damages under the Plan; the Commissioners made their report; it was filed in court and all parties were given statutory notice thereof and, under the statute, were given the right to file exceptions and objections. Thereafter the Court entered its decree confirming the report and thereafter all further proceedings were had pursuant to the statute to perfect the lien of respondent district based upon such assessment of benefits; proper taxing resolution was adopted; bonds were authorized, issued and sold; contracts for the construction of the improvements were let and construction begun. (These proceedings, decrees, contract obligations, etc., could not be abandoned at the option of one party.)

Thereafter a petition was filed **to amend** the original Plan in several minor respects, the principal amendment being the change in direction of one levee, which would include certain additional lands within the levee at the

eastern end of the district. Upon a hearing the Court, on December 29, 1924, granted permission **to amend** the original Plan of Reclamation (Res. Add. Abs. pp. 38-41), at which time a major portion of the improvements provided for in the original Plan of Reclamation had been constructed.

Clearly, under the evidence, it could not be said that all contract rights, bond obligations, assessments, liens, etc., were nullified and abandoned merely by reason of the amendment of the Plan of Reclamation in a minor respect.

Section 12538, Revised Statutes of Missouri 1939, gave to the Board of Supervisors of the District the power to cause amendments to be made in the Plan of Reclamation and provided that "additional assessments **may be made** to pay for any additional work required by such amendments to the plan." It was not obligatory upon the District to cause new assessments. The funds which the District had were sufficient to complete the improvements mentioned in the Plan of Reclamation and in the amendments thereto. Consequently, no new taxing resolution was required or adopted and the District stood upon all of the original proceedings, records, decrees and liens which had been theretofore legally and properly adopted. Clearly, under all the evidence, the decision of the Supreme Court was correct in holding that the amendment of the plan did not operate as any abandonment of prior proceedings.

5. Petitioner's contention, under the record, is unsubstantial, devoid of merit and frivolous (Cases, Brief III).

B.

Petitioner's Contention That Her Constitutional Rights Were Violated by the State Court Because It Held, in Construing Constitutional State Procedural Statutes, That Under Such Statutes the Trial Court Was Acting Within Its Statutory Discretion in Permitting the Plaintiff to Amend Its Petition in This Case After Trial and Before Judgment, and That There Was No Change of Cause of Action by Amendment, Presents No Federal Question, Is Devoid of Merit and Frivolous.

1. The statutes of Missouri expressly conferred discretion upon the trial court to permit the amendment to be made (Sections 971, 973, 974, 969 and 970, R. S. Mo. 1939, hereinafter set forth in Appendix).

2. The Supreme Court of Missouri, and other appellate courts of Missouri, in construing these procedural statutes, have on numerous occasions held that the discretion of the trial court in allowing amendments will not be interfered with on appeal unless it is shown that there has been an abuse of such discretion (Cases cited in Brief under Point IV, Sec. 6).

3. The Supreme Court of Missouri and other appellate courts in Missouri, in construing the above mentioned procedural statutes, have held in numerous cases that said statutes are to be liberally construed, and that the trial courts are to be liberal in granting amendments where the cause of action is not changed (Cases cited in Brief under Point IV, Sec. 7).

4. The amendments made to the petition did not change the cause of action pleaded in the petition and were not regarded seriously by petitioner. The petitioner, heretofore commenting before the Supreme Court of Missouri upon the effect and materiality of the amendment, stated:

"It is not at all clear that plaintiff succeeded in amending its petition so as to state a different cause of action * * *" (Record, p. 192).

5. If the amendment had been of importance, the defendant, under the statutes and laws of Missouri, could have had the case continued to give her an opportunity to obtain and present any evidence which she deemed necessary in view of the amendment. She could have filed an affidavit alleging surprise or that she was misled by such amendments and have obtained proper redress from the trial court. No such action was taken by defendant upon such amendment being made, but she elected to permit the Court to decide the case on plaintiff's evidence without introducing any evidence whatsoever.

6. The decision of the Supreme Court of Missouri involved a construction and application of procedural statutes of the State of Missouri, which are admitted to be constitutional. The decision of the Supreme Court of Missouri on this matter clearly involved no federal question [Cases—Brief Point IV, points (1), (2), (3), (4)].

This Court has expressly held that the due process clause of the Fourteenth Amendment does not control methods of statutory procedure, or give jurisdiction to this Court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters non-federal in character [Brief, IV (3)].

This Court has held that the meaning attributed by a State Supreme Court to a statute of the state must be accepted by this Court, on review, as though such meaning had been specifically expressed in the statute [Brief I (3)].

There is no foundation, color or ground for the assertion by petitioner that a federal question is involved in the

above contention. There is no real, substantial controversy on any federal question which deserves the serious attention of this Court.

Under no stretch of the imagination could this decision of the Missouri Supreme Court permitting the petition to be amended be regarded as a federal question, nor can the permission of the state court to make the amendment to the petition be construed as a denial of any constitutional rights of the petitioner.

C.

Petitioner's Contention That Her Constitutional Rights Were Violated Because the State Court Refused to Hold, Under the Evidence, That "As a Matter of Law" Her Lands Had Not Been Directly Benefited by the Construction of the Improvements Provided for Under the Plan of Reclamation and the Amendments Thereto, and That Therefore Her Lands Had Been Unjustly and Arbitrarily Assessed, Is Not Sound, Presents no Federal Question, Is Without Merit or Substance, and Is Frivolous.

1. Whether or not the lands were benefited is purely a question of fact to be determined from the evidence.

Petitioner offered no evidence whatever to the effect that her lands were not benefited, yet seeks to convey to the Court by innuendo and implication the idea that her lands received no benefits, and demands that the Court find "as a matter of law," without any supporting evidence, that her lands were not benefited. The refusal of the Supreme Court of Missouri to so find violates no constitutional provisions and presents no federal question.

2. Petitioner's predecessor in title was given due notice of the filing of the Commissioners' report assessing benefits against petitioner's land (Plff. Ex. 11, App. Abs. p. 56).

Petitioner's predecessor in title was given the opportunity, 18 years ago, to file exceptions and objections to the assessment of benefits against the lands in question, pursuant to Sec. 12509, R. S. Mo. 1939, and was afforded an opportunity under said statute to appeal from the decision of the Court.

Petitioner's predecessor in title filed no exceptions or objections and took no appeal from the decree confirming the assessments, and in all respects acquiesced therein.

The petitioner is bound by the actions and conduct of her predecessor in title.

Bartlett Trust Co. v. Elliott, 30 F. (2d) 700, l. c. 705, aff. in 40 F. (2d) 351;
Shepard v. Barren, 194 U. S. 553, l. c. 567;
English v. Arizona, 214 U. S. 359, l. c. 365;
Wright v. Davidson, 181 U. S. 371, l. c. 377;
Utley v. City of St. Petersburg, 292 U. S. 106;
Fallbrook Irrigation Dis. v. Bradley, 164 U. S. 112, l. c. 157;
Davison v. New Orleans, 96 U. S. 97, l. c. 104-5;
Farncomb v. Denver, 252 U. S. 7, l. c. 11;
First National Bank v. Board of County Commissioners, 264 U. S. 450.

3. The record further shows:

(a) Petitioner's predecessor in title filed the petition on June 7, 1923, praying that its lands be included within respondent district, and that it desired to form the district **to protect its lands from the effect of wash or bank erosion by the Missouri River, and that such wash and bank erosion would continue unless protection was had** (Res. Add. Abs. pp. 4-9).

(b) The engineers' report in connection with the Plan of Reclamation states that if the erosion by the Missouri River is not prevented that it "would probably take away

most of the lands within the district eventually" (App. Abs. p. 74).

(c) In the case of **Labaddie Bottoms River Protection District v. Randall, 68 S. W. (2d) 871,** in which case petitioner contended that her lands had not been benefited, the Circuit Court rendered judgment against her, holding that the lands had been benefited, and the **St. Louis Court of Appeals held that there was ample, sufficient evidence to support the finding of the trial court that the lands in question were benefited.**

(d) In the case of Lillian I. Randall v. Labaddie Bottoms River Protection District, in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, Division 1 thereof (App. Abs. p. 41), the United States District Judge rendered a written decision and opinion on March 23, 1938, in which the Court said:

> "1. That by reason of the findings, judgments and decrees made and entered by the Circuit Court of Franklin County, Missouri, in the proceedings in said court relating to the incorporation of defendant district, the adoption of the plan of reclamation and amended plan of reclamation, the approval and confirming of the reports of the commissioners and the imposing of assessments of benefits upon lands within defendant district, all above mentioned, and further by reason of the suits, trials and judgments rendered against Point Prairie Hunting and Fishing Club and against complainant (Lillian I. Randall), respectively, in the several suits above mentioned brought by defendant district against said respective parties for the collection of taxes, all of the issues, contentions, controversies, matters and questions presented by the complainant herein were, or could and should have been fully and completely litigated, determined and adjudicated in the aforementioned proceedings and

suits and therefore the issues in this case are res adjudicata.

2. That under the facts in this case the complainant is estopped and barred by reason of her conduct and that of her predecessor in title from prosecuting this suit.

3. **That the facts in this case disclose that complainant's land has received substantial benefits from the construction of the improvements mentioned in the amended plan of reclamation and complainant therefore has no just cause of complaint."** (Emphasis ours.)

4. The record shows that after Lillian I. Randall acquired title to the lands in question by virtue of her purchase at an execution sale on a judgment in favor of Respondent District against her predecessor in title (Plf. Exs. 38-44, Res. Add. Abs. pp. 72-88), **she voluntarily paid to the District the taxes** which were due the District for the year 1930 and subsequently paid, after judgment, the taxes due for the year 1931 (App. Abs. pp. 139-140; Res. Add. Abs. p. 100).

Under these circumstances, the assessment of benefits has been ratified by petitioner and the question of benefits has been heretofore determined, and she cannot now be heard to say that her lands have not been benefited.

Bartlett Trust Co. v. Elliott, 30 F. (2d) 700, aff. in 40 F. (2d) 351;
State ex rel. v. Bates, 235 Mo. 262;
Stamper v. Roberts, 90 Mo. 683.

This contention of petitioner is without merit or substance, is frivolous (Cases, Brief III).

D.

The Constitutional Rights of Petitioner Were Not Violated by Reason of the Refusal of the State Supreme Court to Transfer the Cause to the Court en Banc.

It has been held by this Court that where the judgment of a division of the Supreme Court adverse to a claim made under the federal Constitution is correct, a refusal of the Court en banc to grant a hearing is not a denial of due process of law.

State v. Moore, 159 U. S. 675, 16 Sup. Ct. Rep. 179, affirming 121 Mo. 514.

E.

The Decision of the Supreme Court of Missouri, Under the Evidence in This Case, Was Correct and Was for the Right Party; It Denied Petitioner None of Her Constitutional Rights, and Her Petition for a Writ of Certiorari Should Be Denied.

The evidence in this case discloses:

1. Petitioner's predecessor in title joined with other landowners in filing the petition for the incorporation of the district for the purpose of constructing the improvements provided for under the Plan of Reclamation and amendments thereto.

2. Petitioner's predecessor in title was given notice of the filing of the Commissioners' report assessing benefits against its lands, and was afforded an opportunity under the statute to file exceptions and objections thereto, but it elected not to make any exceptions or objections to the Plan of Reclamation or to the amendments thereto, or to the assessment of benefits against its lands.

3. Petitioner acquired title to the lands in question by virtue of her purchase at an execution sale under a judg-

ment rendered in favor of the District against her predecessor in title for delinquent taxes due the District.

4. Petitioner voluntarily paid 1930 taxes due the District.

5. Petitioner, when sued for 1931 taxes, had the opportunity to raise all constitutional questions, which was not done.

6. Petitioner paid the 1931 taxes to the District after judgment against her.

7. Petitioner has been guilty of laches in raising constitutional questions and by virtue of her conduct and that of her predecessor in title. She has waived the questions now presented to the Court, and is estopped by reason of her conduct from now pressing said contentions.

Under all of these facts, it cannot be said that the decision of the Supreme Court of Missouri denied petitioner any of her constitutional rights.

Authorities in support of our position under this point will be found in this brief under point VI.

We respectfully submit that petitioner's writ for a certiorari should be denied.

Respectfully submitted,

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APPENDIX

of

Sections of Missouri Statutes Involved.

Revised Statutes of 1939.

Chapter 79, Article VII—Organization of Levee Districts:

Sec. 12538. Board May Make Additional Levy of Tax, When and for What Purposes.—Where the works set out in "the plan for reclamation" of any levee district is found insufficient to reclaim in whole or in part any or all of the land and other property of the district the board of supervisors shall have the right to formulate new or amended plans containing new levees or other works, or providing for the enlargement of existing levees or other works, and additional assessments **may** be made in conformity with the provisions of section 12511, the same to be made in proportion to the increased benefits accruing to the lands and other property because of the additional works. If it should be found at any time that the amount of total tax levied under the provisions of section 12511 is insufficient to pay cost of works set out in "the plan for reclamation" or additional work done under the provisions of this section, the board of supervisors may make an additional levy to provide funds to complete the work: Provided, the total of all levies of such tax does not exceed the total amount of benefits assessed. (R. S. 1929, § 10948.)

Chapter 6, Article VI—Amendment of Pleadings:

Sec. 971. Amendment Before Final Judgment.—The court may, at any time before final judgment, in furtherance of justice, and on such terms as may be proper, amend any record, pleading, process, entry, return or other pro-

ceedings, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. (R. S. 1929, § 819.)

Sec. 973. Errors not Affecting Substantial Rights Disregarded.—The court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect. (R. S. 1929, § 821.)

Sec. 974. Amendments After Judgment.—After final judgment rendered in any cause, the court may, in furtherance of justice, and on such terms as may be just, amend in affirmance of such judgment any record, pleading, process, entries, returns or other proceedings in such cause, by adding or striking out the name of a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by rectifying defects or imperfections in matters of form, and such judgment shall not be reversed or annulled therefor. (R. S. 1929, § 822.)

Sec. 969. Variance, When Deemed Material.—No variance between the allegation in the pleading and the proof shall be deemed material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits; when it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, by affidavit showing in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just. (R. S. 1929, § 817.)

Sec. 970. Variance Not Material, Proceedings.—When the variance between the allegation in the pleading and the proof is not material, the court may direct the facts to be found according to the evidence, or may order an immediate amendment without costs. (R. S. 1929, § 818.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

LILLIAN I. RANDALL,
Petitioner,
vs.
LABADDIE BOTTOMS RIVER PROTECTION DISTRICT OF FRANKLIN COUNTY, MISSOURI, a Corporation,
Respondent.
No. 981.

REPLY BRIEF.

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REPLY BRIEF.

Respondent's Brief in Opposition to Petition for Writ of Certiorari Doesn't Purport to Meet the Questions Presented by Petitioner.

Respondent in its brief does not purport to meet and make answer to the questions which petitioner presents. On the contrary, it frames four questions of its own (Resps. Brief pp. 2-3) and then proceeds to demonstrate that its questions are without merit. There could be no point in any inquiry as to whether or not respondent has succeeded in burning its straw men.

Some of Numerous Misstatements of Fact in Respondent's Statement of Facts.

Due to press of time, we shall devote this short reply brief to the task of calling to the Court's attention some of numerous errors and misstatements of fact and of vol-

unteered statements dehors the record, as included in respondent's reply brief.

At page 3:

> "The constitutionality of the statutes is not questioned by petitioner."

If by this respondent means to state that petitioner makes no point that the Levee District Act, as written, is unconstitutional, the statement is true. However, petitioner contends vigorously that the statute as construed and applied in the particular case is unconstitutional.

At page 5, fourth paragraph:

We believe the record is silent as to whether or not petitioner's predecessor in title filed exceptions to the commissioners' report of either the first or second assessment of benefits.

At page 5, sixth paragraph:

> "No appeal was taken from this decree as was permitted by section 12509."

That section excludes any appeal by a landowner on the question of benefits. The appeal authorized (last clause of the section) is expressly limited to apply to that part of the decree wherein it is judicial and in an eminent domain proceeding (last sentence of section 12509, Appendix to Petition, page 89). The reason for that limitation is that the Court, in that part of the decree confirming the assessment of benefits, is as petitioner demonstrates made by the Court, not judicially, but as a reviewing agency of the legislative branch of government (Petition, page 34, paragraph 2; Specifications of Error I, page 44).

At pages 5-6:

Respondent states purported facts with reference to a purported issue of bonds and use of proceeds to pay for the planned improvement. At his reference (Resps. Add. Abst. pp. 57-72) it appears that the taxing resolution (appropriating under section 12534, Appendix to Petition pp. 96-97; Appellant's Abst. p. 133) was adopted on September 30, 1924, and there is no showing whatever that bonds were sold thereunder, or, if sold, what, if any, disposition or use was made of the funds. That resolution was passed on September 30, 1924, just fifteen days before October 15, 1934, the date on which respondent's petition was filed (Abs. p. 57) for approval of the Amended Plan for Reclamation theretofore adopted (Abs. p. 60). Considering the necessarily consumed time prior thereto after decision to adopt an amended plan and after adoption of the bond resolution before a sale and delivery of bonds could be made, either those bond proceedings must have been abandoned or the purchasers were wholly deceived as to the state of the record. Beyond that we do not understand what purpose, other than to attempt to create a prejudice, that record can serve in this proceeding. The bondholders are not complaining, if in fact there are any bondholders.

At page 7, first paragraph:

In this paragraph respondent attempts by inference, avoiding direct statement, to tell the Court that the proceedings under which its Amended Plan for Reclamation was adopted and approved were had under section 12538 (Appendix Petition, p. 100). This is not a true statement, nor is it an honest representation. Respondent is not being honest with the Court. Respondent in its "Petition to Amend the Plan for Reclamation" expressly proceeds (Abst. p. 62) under section 4636 (now section 12532; Abst.

pp. 75-77). In its amended petition on which the cause was tried respondent expressly pleads that on the fourth day of October, 1924, it "adopted a certain 'Amended Plan for Reclamation' under the provisions of section 4636 * * * now section 10942" (now section 12532) (Abst. p. 13). The State Supreme Court (against the same inferential statement) found and considered also that the proceedings were had under section 12532 (R. pp. 186, 188). Respondent relies on the judgment of the State Supreme Court and ought not to have made this contra and untrue representation in question.

At page 7, last full paragraph:

The statement of this paragraph is substantially correct, as can be verified from the references there made to the record. (See also Opinion, R. p. 190, last para.)

At pages 7-8:

The respondent emphasizes the lapse of time, but overlooks to inform the Court that enforcement of any assessment has been resisted consistently from the first attempt (see Resps. Brief pp. 8-9), and that the instant suit was instituted to the November Term, 1935 (Abst. p. 2).

At page 8, first to fourth paragraphs:

The respondent here purports to state of record, but the statement finds no support in the record and respondent, therefore, has not undertaken to make reference to the record for them.

At page 9, first paragraph:

The qualification "voluntarily" finds no support in the record. The reference (Resps. Add. Abst. p. 100) is to the purported findings of fact made by the trial court subsequently to the change, by post trial amendment, of plain-

tiff's petition from a claim on its second and "amended plan" and assessment to its first and "original plan" and assessment. Of course, no question is involved here as to whether or not the findings are without support. That would not constitute basis for a constitutional question. Our question is as to the constitutionality of the change of cause and the entry of judgment on the changed cause without hearing.

At page 9, second full paragraph:

Respondent purports to state a case reported in **68 S. W.** (2d) 871. There was no issue pleaded or tried with reference to any such case. Off the record, had such an issue been joined, petitioner as defendant would have pleaded and proven (1) that no constitutional issue was tendered, joined, tried or decided, and (2) that the judgment was procured by fraudulent and false testimony, in this, that an officer of the District testified that benefits to petitioner's lands were provided for in this way: That, in substance, the District had an oral contract with the United States Government by which, in consideration that the District would protect the lands from bank wash and erosion at the point where the "spur dykes" were provided and which would cast a cutting current against petitioner's island, the United States would construct protective works along the island to avoid the cutting; that the cutting resulted and then the United States built the protective works. Which testimony was preposterous and not true; that this was the only evidence on which the judgment could have been sustained. The defense was conducted by youthful and wholly inexperienced counsel. That patently fictitious claim wasn't repeated in this suit. The Government works there testified to were merely a part of the works constructed in a general river channel stabilizing program.

At pages 9 to 10:

Respondent refers to a suit in the United States District Court and refers to abstract page 4. The statement on the said reference is untrue and misleading (R. pp. 41-42). The judgment in that suit was not on the merits, but a dismissal by the District Court on the ground that it was without jurisdiction of the federal constitutional questions (Abs. p. 42). The action there in question is further evidence of continued resistance to imposition of the lien in question.

At page 10, first full paragraph:

Respondent calls attention to the fact that when it amended its petition after trial, petitioner filed no affidavit of surprise, and by inference that petitioner's (as defendant) remedy was under section 970 and by such affidavit. Respondent overlooks that the trial had been concluded and the cause submitted more than a month prior to that occasion.

Section 970 has no application to cases of failure of proof.

Leslie v. Ry. Co., 88 Mo. 50;
Beck v. Farara, 19 Mo. 30.

A party cannot plead one cause of action and recover on another.

Jones v. Waters, 17 Mo. 587;
Hubbard v. Ry. Co., 63 Mo. 68;
Boone v. Stover, 66 Mo. 430;
Clements v. Yeates, 69 Mo. 623;
Wilson v. Albert, 89 Mo. 537, 1 S. W. 209.

In case of departure, or proof of cause not pleaded, or total failure of proof, no affidavit is necessary.

Connor v. Ry. Co., 298 Mo. 18, 250 S. W. 574;
Hibler v. Rys. Co., 292 Mo. 14, 237 S. W. 1016;

Swift v. Ry. Co. (Mo. A.), 15 S. W. (2d) 974;
Inguerson v. Ry., 205 Mo. 328, 103 S. W. 1143;
Scovill v. Glasner, 79 Mo. 449.

In cases other than of immaterial variance the practice is that objection to the allowance of an amendment should be made when leave to amend is asked, followed by refusal to proceed on the amended petition. Which is what petitioner did (Abs. pp. 161-162).

Lee v. Battery Co. (Mo.), 23 S. W. (2d) 45;
Heman v. Glenn, 129 Mo. 525, 31 S. W. 589.

Respondent then takes out of its text a partial statement from the record. (The State Supreme Court did that, too, but incorporated more of the text.) Respondent then quotes it as an admission by petitioner that she didn't consider the post trial amendment material. Respondent leaves off this much of the statement employed by the Court: "but it certainly did succeed in effecting a more obscured statement of its cause." The language was taken by the Court from petitioner's brief wherein it constituted a part of an argument that the respondent's petition after the amendment then contained enough of statement of reliance on the "Amended Plan" and assessment and enough of statement of reliance on the "Original Plan" and assessment that it was within the range of possibilities that it might be construed to be on either of them, but that in the one case it fell with failure of proof and in the other fell for departure—a perfectly innocuous statement of doubt.

We are not suggesting that it is the province of this Court to pass on the merits of the controversy on the petition for certiorari. Respondent may entertain that opinion. It does seem to us, however, that there is so little of true statement commingled with so much of false, careless or misleading statement in the statement section of respondent's brief as to deprive it wholly of all value.

At page 11, paragraph numbered 1:

From the beginning to end of this proceeding, plaintiff's lands have been identified by both petitioner and respondent as "Bull Island" and as separated from the mainland by a wide slough, as they are described in plaintiff's petition, page 21. Anyone who has eyes can read the lines on the plat (Rec. following p. 98): "South Bank of Bull Island, April 1915," "River Bank of April 1915," and the existence of the area between the two, water in 1915, lowlands (elevation figures) in 1923.

At page 12, paragraph numbered 2:

It is petitioner's contention, based on respondent's petition and proof, that none of the improvements provided for by respondent's "Original plan" were made under that plan. There was no issue involved as to that contention. Respondent pleaded (Abs. p. 16) that after it had adopted its "Amended plan" it commenced and completed the work in accordance with it (R. p. 16), and petitioner admitted that fact (R. p. 24). The state court found that the improvement was constructed under the "Amended plan."

It is fundamental in the law of procedure in Missouri that a party will not be permitted to contradict an allegation of his pleading.

Wilson v. Albert, 89 Mo. 537, 1 S. W. 209;
Weil v. Poston, 77 Mo. 284;
Bruce v. Sims, 34 Mo. 246.

At page 12, paragraph numbered 3:

The statement there quoted is from petitioner's petition for writ of certiorari. Petitioner expects to be able to establish it. Even a nonexpert computation of the cost of building the levees across the slough would carry the cost far beyond the total benefits assessed. The statement is

taken near verbatim from testimony of respondent's chief engineer.

At page 13, second full paragraph:

Respondent misconceives petitioner's point. It is that the landowners who signed the petition for incorporation contemplated enclosing all lands, and the complaint is that, on the engineer's recommendation, the landowners' purpose to enclose Bull Island was abandoned.

At page 13, third paragraph:

Respondent's statement is picked out of clear air and cannot be given even argumentative foundation on the record.

At pages 13-14 and

At page 14, paragraph numbered 4:

The assessments in full on all lands are in evidence; so also are the elevations of lands. Petitioner's point is that lands of like elevation, not high lands on the shore opposite Bull Island, were assessed alike. Petitioner will be able to demonstrate in dollars and cents, at a hearing on the merits if that be had, that the statement in her petition is literally true.

Respondent's Brief.

Preliminarily:

It could serve no useful purpose to reply point by point to the brief and argument of respondent made to the end of destroying its straw men. The argument is not directed against either the questions presented by or the brief of petitioner thereon. However, there are some instances in which petitioner believes the inapplicability of contention of respondent's brief ought to be suggested to the Court.

I.

Throughout this point and its subdivisions respondent overlooks and doesn't attempt to meet the underlying philosophy of petitioner's contention that a state statute may violate the Federal Constitution either by its terms or by the construction and application given it, and that the one is as fatal as the other.

II.

Respondent overlooks a fundamental consideration, the counterpart of its brief, which is that, where a federal question is decisive of the case regardless of the judgment on the other issues, the constitutional consideration prevails, it being the higher law.

III, IV, V.

These points are fully met in petitioner's brief, supplemented by what we have said above with reference to variance and departure.

Respectfully submitted,

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CLERK

(12)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

LILLIAN I. RANDALL,
Petitioner,
vs.
LABADDIE BOTTOMS RIVER PROTECTION DISTRICT OF FRANKLIN COUNTY, MISSOURI, a Corporation,
Respondent.
No. 981.

PETITIONER'S PETITION FOR REHEARING.

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SUPREME COURT OF THE UNITED STATES.

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PETITIONER'S PETITION FOR REHEARING.

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

On behalf of petitioner, Lillian I. Randall, we hereby petition the Court for a rehearing and further consideration of the questions presented by this petition for writ of certiorari to the Supreme Court of Missouri, for the reason that we believe, in good faith, that certain matters of fact and matters of law inadvertently have been overlooked by the Court in its judgment of April 6, 1942, denying petitioner's said petition.

Among the material matters of fact and matters of law which we believe were overlooked by the Court in arriving at its conclusion to deny the writ, are the following:

1. We believe, in good faith, that the Court has overlooked giving consideration and effect to the circumstance that the federal questions involved were not decided on their merits by the state court, and that in last analysis this petition is an original complaint against the state.

Assuming that the petition for the writ states a cause, which we believe it clearly does, then denial of the writ denies a hearing, in the first instance, on a claim of constitutional right and converts constitutional rights stated in positive terms of universal application to the character of claims to be considered at the discretion of the Court in which they are made, and subordinates the Constitution of the United States to the law and action of the state against which the language of the Constitution directs itself in prohibitive terms. It was not the intention of the framers of the Constitution that the state should be the judge of its own wrongs against the Constitution or exercise any discretion with respect thereto. Neither was it the intention that enforcement of rights under the Constitution, or of federal law enacted under and in conformity with it, should be administered by grace in the discretion of state or federal court, and applied in each or any particular case.

We here are considering a case in which the state court has refused to decide federal questions, clearly substantially involved—a case of petition for hearing on and adjudication of federal questions not decided, and a first instance decision, of which is sought in this court, it being the only court vested with original jurisdiction under the circumstances.

We here are not concerned with a case in which a state court had federal questions before it which it decided and which this Court could, on examination of the record presented, determine whether or not the decision was right. Further, we, in good faith, believe that we are not here concerned with a petition which does not state a case. In cases such as are excluded from consideration by this paragraph, this Court long has held that formerly writ of error and laterally certiorari is not to be awarded as of right. With that ruling no one can seriously disagree. However, we do not find an instance, and doubt that there is an instance, in which this Court either has held that the writ should not issue as of right in such a case as is mentioned in the next preceding paragraph—the instant case—or, for that matter, has either considered or ruled one way or the other on such a case. We do believe, however, and urgently suggest, that the question is fundamental and of universal interest and ought to be settled by a considered opinion of this Court.

We, in good faith, believe that in legal effect the denial of petitioner's petition has made the protection claimed under the Constitution to be not a right of universal application, but a matter of judicial grace to be dispensed by the Court in its discretion.

This may be demonstrated thus: Petitioner complains (a) that the state trial court tried one case and adjudged another which was not tried, and on which petitioner was not heard either by pleading or trial of issues joined, and that whatever the state court may have construed its law to permit, that judgment was entered in circumstances prohibited by the Constitution; and then (b) petitioner complains that the State Supreme Court, in the first instance, held that the state law authorized the judgment to be entered under these circumstances, and that, therefore, it was not necessary to consider whether or not the Constitu-

tion of the United States forbade it. The petition seeks review of these rulings invoking the protection of the Constitution in respects in which it guarantees the citizen against action by the state. The petition is directed, in last analysis, against the state action taken by its Supreme Court. Only this Court has jurisdiction to secure to the citizen his rights against the state acting through its Supreme Court. It essentially, in such case, is an original jurisdiction. We respectfully suggest that the writ ought to issue of right in such case, if the petition states a case. Otherwise the constitutional guaranty against the state action complained of is denied to the particular petitioner without a hearing, and its enforcement and hearing thereon made to become a matter of grace to be awarded or withheld at the Court's discretion, a result which this Court, in so far as we can discover, has never affirmed to be the law.

Construction of section 344-b (28 U. S. C. 344-b) is directly involved. If that section is procedural, then we believe our suggestion above is wholly meritorious. If the section is an enactment of substantive law purporting to relegate hearing and adjudication of complaint of violation of constitutional guaranty against invasion by the state to the position of hearing and adjudication as a matter of grace at the discretion of the federal court vested with original jurisdiction (in the sense of the first court whose jurisdiction may be invoked thereto) of the complaint, then it emasculates the Constitution and makes constitutional rights guaranteed in positive terms of universal application to depend upon judicial grace awarded or withheld at judicial discretion to or against the particular citizen, and loses its character, both as a constitutional guaranty and as a law. So construed, section 344-b itself would be rendered unconstitutional as an attempt by the Congress to modify the Constitution by statute.

Of course, though the invoking litigant, we are not advised by the denial of the writ of the reason for its denial, and must, therefore, assume that the Court concurred in the view of the state court, that is, that the matter of complaint did not state a case, since, in legal effect, the state law as construed and applied in the particular case by the state court permitted to be done what was done, and, therefore, inquiry as to whether or not the state law, so construed and applied, conflicted with the Federal Constitution need not be inquired into; differently stated, the very evil anticipated, and against which the constitutional guaranty is directed, is made to become, if perpetrated, a bar to constitutional inquiry as to its perpetration and remedy against it. This result impresses us with a deeply-grounded abhorrence against the validity of that reasoning and conclusion.

2. We refrain from extended discussion of the merits of the petition, believing, as we do, that its merits are adequately stated in and made to appear on it. However, we do want to call to the Court's attention anew that included within the scope of the matter considerations above suggested are the complaints particularly:

(a) To the general effect that the judgment of the state trial court violated the Fourteenth Amendment, it being entered on a cause on which petitioner was not heard nor afforded opportunity to be heard, and as to which neither the state court nor this Court can be advised from the record as to what would be petitioner's defenses, if sued on the cause on which the judgment was rendered, or as to the completeness or legal effect of her defenses (Questions 5 and 6).

(b) To the general effect that the State Supreme Court refused to consider the constitutional issues through subordinating, in effect, the Federal Constitution to the state

law as construed and applied in the particular case (Questions 3 and 4).

3. We particularly urge further consideration of two other questions:

(a) To the general effect that an assessment may not be made for a local improvement against lands which, on the face of the proposed improvement, could not be benefited, and which certainly and clearly were excluded from any benefit from the levee, by being excluded from enclosure within it, it being the primary improvement, the assessment being on a parity with that against lands of like elevation which were clearly totally benefited by the levee by being wholly enclosed within it (Questions 1 and 2).

(b) To the general effect that the result of adopting a total new amended plan for reclamation and the imposition of a total new assessment based wholly and independently upon it, as constituting an abandonment of or as superseding the prior original plan and assessment on it, is to be determined, in the particular case, by construing an intention into proceedings under the state statute inconsistent with the statute, to the exclusion of construction of the statute itself, constituted judicial taxation by special law applicable to a particular property and person only (Question 7).

3. Our understanding of the proper function of a petition for rehearing is that it be a constructive criticism of the judgment made with the ends in view.

First, to aid the Court in discovering weaknesses or errors in judgment.

Second, to protect litigants against loss of their lawful rights through such errors.

Constructive criticism can be written only by counsel who have diligently studied their case, believe honestly and

sincerely in their position, hold a proper attitude of respect for and confidence in the Court, and a tolerance of the views of opposing counsel. We profess to qualify on these terms as counsel filing this petition; and we trust this petition will incite the further study which the case merits.

Respectfully submitted,

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Certificate of Counsel

In compliance with the rule of this Court, we, as counsel for the petitioner for whom the foregoing petition is filed, certify that this petition is filed in good faith, and is believed by petitioners, as well as counsel, to be meritorious.

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